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No. \_\_\_\_\_

2813

**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

JOHN A. ROEBLING'S SONS COMPANY OF  
CALIFORNIA and I. P. MORRIS COMPANY,  
Appellants,

VS.

IDAHO RAILWAY LIGHT & POWER COMPANY,  
O. G. F. MARKHUS, Receiver of said Company,  
GUARANTY TRUST COMPANY, Trustee,  
ELECTRIC INVESTMENT COMPANY,  
AMERICAN STEEL AND WIRE COMPANY,  
GENERAL ELECTRIC COMPANY and  
WESTINGHOUSE ELECTRIC AND MANU-  
FACTURING COMPANY,

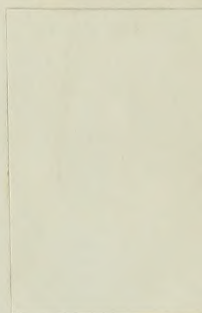
Appellees.

**Filed**

**Transcript of the Record** JUN 12 1916

**F. D. Monckton,**  
Clerk

*Upon Appeal from United States District Court for  
the District of Idaho, Southern Division.*





**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

---

JOHN A. ROEBLING'S SONS COMPANY OF  
CALIFORNIA and I. P. MORRIS COMPANY,  
Appellants,

vs.

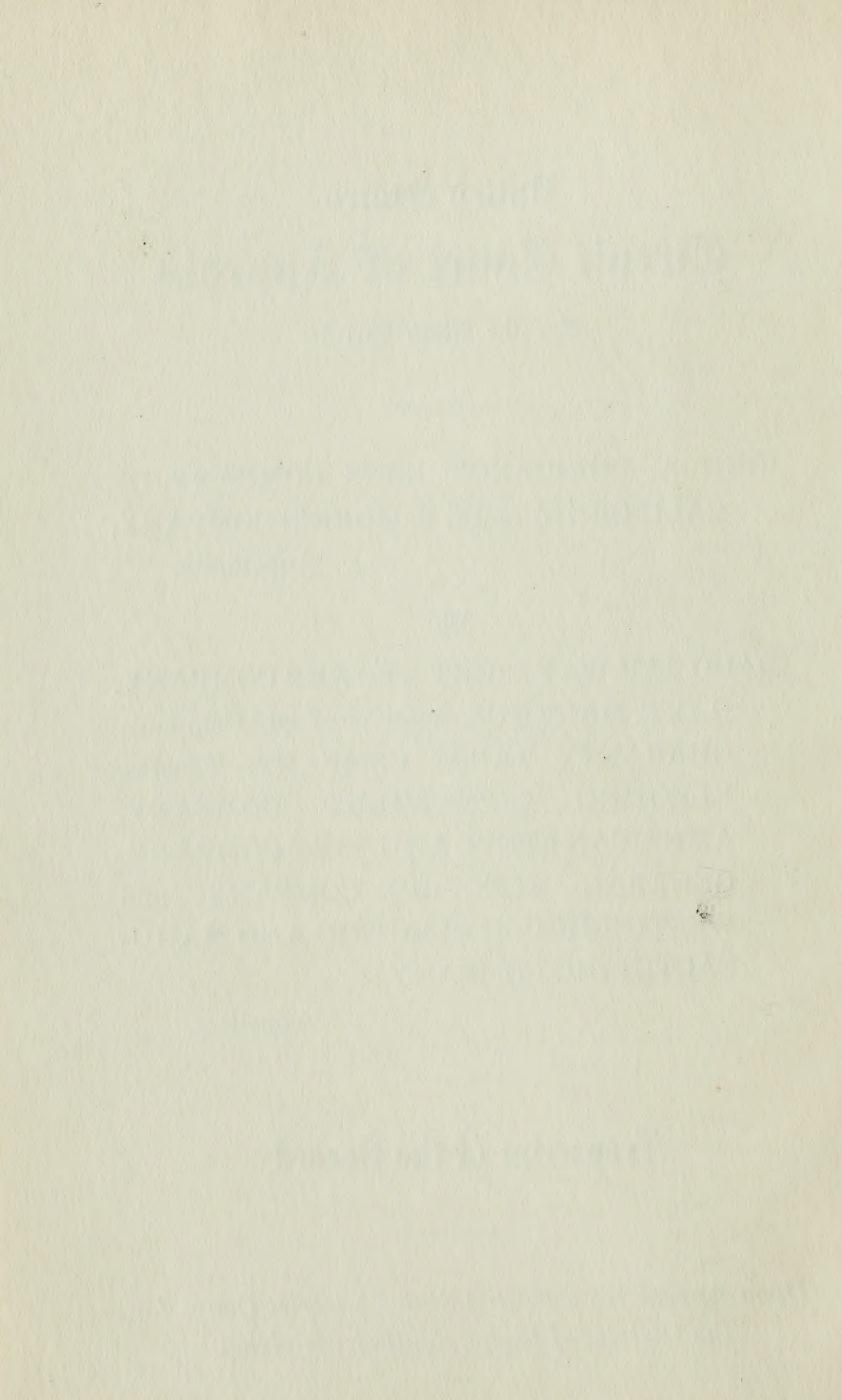
IDAHO RAILWAY LIGHT & POWER COMPANY,  
O. G. F. MARKHUS, Receiver of said Company,  
GUARANTY TRUST COMPANY, Trustee,  
ELECTRIC INVESTMENT COMPANY,  
AMERICAN STEEL AND WIRE COMPANY,  
GENERAL ELECTRIC COMPANY and  
WESTINGHOUSE ELECTRIC AND MANU-  
FACTURING COMPANY,  
Appellees.

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**Transcript of the Record**

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*Upon Appeal from United States District Court for  
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Messrs. HAWLEY & HAWLEY,  
Boise, Idaho,  
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Messrs. WOOD & DRISCOLL,  
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Solicitors for Appellee Westinghouse Elec-  
tric and Manufacturing Company.

*Upon Appeal from United States District Court for  
the District of Idaho, Southern Division.*

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, *Plaintiff,*  
vs.

IDAHO RAILWAY, LIGHT & POWER COMPANY, *Defendant.*

In Equity—No. . . . .

BILL OF COMPLAINT.

*To the Honorable Judges of the District Court of the  
United States, for the District of Idaho, Southern  
Division:*

The plaintiff, Westinghouse Electric & Manufacturing Company, a corporation duly organized and existing under the laws of the State of Pennsylvania, and a citizen of said State, brings this, its bill of complaint against the Idaho Railway, Light & Power Company, a corporation organized and existing under and by virtue of the laws of the State of Maine, and a citizen of said State, and doing business in the State of Idaho, and having its principal place of business and residence in the Southern Division of the District of Idaho, on behalf both of itself and of all other creditors of said Idaho Railway, Light & Power Company who may hereafter join in the prosecution of this suit, and thereupon the plaintiff alleges as follows:

*First.*

That the plaintiff Westinghouse Electric & Manufacturing Company, hereinafter sometimes called the

Westinghouse Company, is a corporation duly organized and existing under the laws of the State of Pennsylvania, and a citizen and resident of said State.

The defendant Idaho Railway, Light & Power Company, hereinafter called the Railway Company, is, and at all the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Maine and a citizen of said State, but having its principal place of business and residence in the State of Idaho, and in the Southern Division of the District of Idaho, wherein said defendant is engaged in the business of generating and distributing electricity, and of owning and operating through a lessee, electric railway lines, as hereinafter stated.

That this is a civil suit in the nature of a claim in equity and is between citizens of different states and the amount in controversy herein exceeds the sum of three thousand dollars, exclusive of interest and costs.

*Second.*

That the defendant Railway Company was organized under the laws of the State of Maine in the month of November, 1911, and at the time of its organization, or shortly thereafter, acquired by purchase a power plant on the Snake River between Owyhee and Ada Counties in the State of Idaho, known and hereafter referred to as the Swan Falls power plant, with distributing lines from said plant extending through and into the counties of Canyon, Owyhee and Ada in the State of Idaho, and shortly thereafter acquired distributing systems in Nampa, Idaho, formerly be-



longing to the Dewey Electric Light & Power Company; in Caldwell, Idaho, formerly belonging to the Caldwell Power Company, Limited; in Middleton, Idaho, formerly belonging to the Southern Idaho Water Power Company, and has since constructed distributing systems in the villages of Star and Eagle, Idaho, and during the year 1912, acquired by purchase the electric railway properties formerly belonging to the Boise & Interurban Railway Company, Limited, being an interurban electric railway line from Boise, Ada County, Idaho, to Caldwell, Canyon County, Idaho, with an urban system in Boise City; the Boise Valley Railway Company, being an interurban line from Boise, Ada County, Idaho, to Nampa, Canyon County, Idaho, with a local urban and suburban system in and around Boise City; and the Boise Railroad Company, Ltd., being an urban and suburban line of electric railway in and around Boise City; that the said defendant railway company has also acquired by purchase during the year 1912, a large number of stocks and bonds of the Idaho-Oregon Light & Power Company, a corporation engaged in the manufacture and distribution of electrical energy in various cities and villages in southwestern Idaho, and plaintiff is informed and believes has acquired other hydro-electric properties or interests therein to the said plaintiff unknown.

That the Railway Company by reason of its acquisition and ownership of said properties is engaged in public service of a delicate and important nature with heavy responsibilities to the public, owning and

directly operating, as it does, a power plant which, as plaintiff is informed and believes, is the principal source of electric supply in southwestern Idaho, and upon which many communities place their sole reliance for electrical energy for lighting, manufacturing, mining and other purposes; other communities are partially supplied from independent or affiliated sources, likewise requiring supply from said Swan Falls plant to supply their demands, and also in the operating through its said lessee of its traction lines, amounting to some sixty (60) odd miles of interurban lines, and over ten (10) miles of urban and suburban lines in and around Boise City, which said traction lines are operated, as plaintiff is informed and believes, through the Idaho Traction Company, a Delaware corporation, the stock in which is owned by the said Railway Company, and which leases from said Railway Company the railway or traction properties of said Railway Company, yielding and paying in return therefor to the said Railway Company its net profits over operation.

*Third.*

On information and belief that said defendant Railway Company has an authorized capital stock of thirty million dollars (\$30,000,000), of which twenty million dollars (\$20,000,000) is common stock and ten million dollars (\$10,000,000) is non-cumulative preferred stock. Of the common stock there has been issued \$12,565,100.00, par value, and preferred stock \$3,536,400.00, par value, which is outstanding in the

hands of the public. That shortly after its organization the said defendant Railway Company created an issue of bonds to the amount of thirty million dollars (\$30,000,000), secured by mortgage on said defendant's properties known as a first and refunding mortgage dated as of December 1st, 1911, and bearing interest at five per cent per annum, paid semi-annually, of which bonds to the extent, amount, and face value of \$7,255,000, have been issued, delivered and are outstanding in the hands of the public, and the balance are subject to certification, issuance and delivery under said terms and conditions stated in said mortgage.

That in addition to the bonds so outstanding the properties of the said defendant are encumbered by the following underlying divisional mortgages upon parts of its said system; bonds of the Boise & Interurban Railway Company, Limited, \$1,073,000; bonds of the Boise Railroad Company, Limited, \$389,000, which said bonds are secured by mortgages upon the properties hereinbefore mentioned as acquired from the Boise & Interurban Railway Company, Limited, and from the Boise Railroad Company, Limited, respectively.

On information and belief plaintiff states that failure to meet the interest on the mortgage indebtedness upon any of said mortgages will by the terms thereof constitute a default in said mortgages and will mature, both principal and interest on the same, and render such mortgages enforceable and destroy the security of general creditors.



*Fourth.*

That the defendant Railway Company since acquiring the said properties hereinbefore mentioned has consolidated the power properties, generating stations, transmission and distribution lines, and electric railway or traction properties, with all extensions thereof, into single systems respectively. That the said power properties are operated as hereinbefore stated directly by the said Railway Company which is a retailer of power in various cities and villages hereinbefore mentioned, and in other places, and is a wholesaler of power to the said Idaho-Oregon Light & Power Company and to the said Traction Company, through which as lessee, as above stated, the said railway company operates its said traction properties. That said traction properties are likewise operated as a single and interdependent system, and the properties heretofore belonging to the different companies have been unified, not only in control and management but in physical connections and extensions, so that what were formerly three separate operating companies and properties are now in fact one, and the lines of demarcation between them have been obliterated, likewise the rolling stock of the constituent companies has been used without decrimination on the entire system; barns and repair shops have been consolidated and a single overhead electrical system established, rendering the operation of said traction properties into their constituent elements practically impossible. That to segregate either the power properties or the traction properties

into their component parts, would be attended with great difficulty and cause great loss and waste, and cause great increase in operating expenses, and diminish the security of the bondholders and general creditors.

*Fifth.*

Plaintiff Westinghouse company alleges that on the following dates defendant Railway Company, for valuable consideration, made, executed and delivered to plaintiff its promissory notes, bearing the dates, maturities, and being for the principal sum, and each bearing interest at 6 per cent. per annum from date until paid, set forth as follows:

<i>Date Drawn</i>	<i>Date Due</i>	<i>Principal</i>
Mar. 20, 1913	July 20, 1913	\$ 2,908.44
Mar. 20, 1913	Nov. 20, 1913	2,908.43
Mar. 31, 1913	July 31, 1913	7,670.62
Mar. 31, 1913	Nov. 30, 1913	7,670.62
May 2, 1913	Sep. 2, 1913	2,644.70
May 2, 1913	Jan. 2, 1914	2,644.70
July 16, 1913	Oct. 16, 1913	14,313.93

making an aggregate of \$40,761.44, exclusive of interest, and none of which has been paid and all of which is now due and owing from the defendant Railway Company to the said plaintiff Westinghouse Company, with interest, as aforesaid, save and except the sum of \$2,644.70, which, while unpaid, is not due until January 2, 1914.

That in addition to the foregoing notes the said defendant Railway Company is indebted to the said

plaintiff on open account in the sum of at least \$10,-047.55 for materials and supplies sold and delivered by the plaintiff to the defendant between the first day of March, 1913, and the first day of November, 1913, at the special instance and request of the defendant, which said sum is now due and owing from the defendant to the plaintiff. Payment of all of said notes due, with interest, and for all of said materials has been demanded by the plaintiff of defendant, and refused. The plaintiff asks leave in this connection to hereafter amend this paragraph so as to state the full amount due on open account.

That all of said notes were given and said indebtedness for material was incurred for electrical supplies and apparatus, including generators, transformers, substation apparatus and other electrical apparatus and equipment necessary to be used and actually used by defendant in the maintenance and operation of its electrical system, including both its traction properties and its electrical generating and distributing system in the discharge by the said defendant of its obligation and duties.

*Sixth.*

That the plaintiff is informed and believes and so states that, since acquiring the said properties and issuing the bond hereinbefore mentioned, the defendant has expended large sums of money, aggregating upwards of \$500,000 in extensions, improvements and additions and other capital expenditures, to and upon its existing lines, including both its electrical and traction properties; that said expenditures have



enhanced the value of its properties, but have exceeded the resources of said defendant.

That the defendant is in addition thereto under liability for materials and supplies to complete its enlargements and additions, and to complete the payment for properties, which defendant purchased, but which have not yet been completed, and on which large sums are still due, and that it has not and will not have the resources with which to pay for such additions, improvements and new acquisitions unless appropriate means are taken for conserving the properties and assets of said defendant and enabling it to finance its said accruing obligations.

*Seventh.*

On information and belief, that the defendant has outstanding a floating indebtedness for materials, equipment and supplies furnished aggregating approximately \$1,000,000; that it has accounts payable amounting on December 1, 1913, to \$116,621, and notes payable, amounting on said date to \$764,361.44, all of which said floating indebtedness is overdue; that the defendant is unable to pay the same and the holders thereof are pressing for payment; that it has no means at hand with which to meet its immediate pressing needs in operating its systems; some of its creditors have already filed mechanics' liens, others have brought suit and levied attachment for their claims, and others are threatening to do likewise.

That defendant is not only unable to meet said obligations, but also is unable, under the actions already taken and threatened against it, to accumulate an

interest reserve, sufficient to meet the interest upon its bonds, and there is grave danger that default may, therefore, accrue upon all or some of the issues of general or divisional bonds upon said defendant's system, resulting in said system being broken up into its component parts and the interest of the bondholders, creditors and public sacrificed by reason thereof.

That the defendant's position is rendered more acute by reason of default in interest upon the bonds of the Idaho-Oregon Light & Power Company, held by the defendant in the passing of said company into the hands of a receiver, resulting in a loss to said defendant of the money, approximating \$2,000,000, invested by said defendant in the Idaho-Oregon Light & Power Company; and also by the existing financial depression.

That it is impossible for the defendant, under present conditions, to raise the money necessary to meet its said obligations, and with the attachments now standing against it, has not funds on hand sufficient to meet its taxes, which are now due and which will be delinquent on the first Monday in January, 1914, if not before paid.

*Eighth.*

On information and belief, plaintiff alleges that the only means whereby defendant can meet its obligations under its mortgages, pay its floating indebtedness and discharge its current obligations is by continued maintenance and operation of said system as a whole; that any suits upon or processes against its

properties or revenues would seriously embarrass and cripple it and diminish, if not destroy, its power to operate successfully its system or the exercise of its franchises.

That said system, together with its appurtenances, is now in reasonably good state and condition; that it is of vital importance to the people of Ada and Canyon Counties in the State of Idaho that said system shall continue to be operated as a whole and that it shall be preserved as such; that the traction lines of said defendant serve annually a vast number of people and afford the only or at least one of the principal means of direct communication between the points served by it; that many people have made investments, acquired residences and engaged in business in reliance upon and under the assumption that said system will be maintained and operated as a unit, and it is important to all concerned that the same shall be protected in its integrity.

*Ninth.*

Plaintiff alleges that, in view of the facts above set forth, unless this Court shall take said property of the defendant into judicial custody for the protection of every interest, immediately upon default individual creditors will assert their rights and remedies in this and other Courts, resulting in a multiplicity of suits and attempts by one creditor to get a preference over others through liens, attachments, judgments and other forms of priority; that it will be rendered impossible to maintain the integrity of the defendant's said system, and the same will be broken



up to the serious inconvenience of the public, and to the serious loss and detriment of all persons interested in said properties, whether as bondholders, creditors, or the public.

An attempt by plaintiff to enforce at law its claim as general creditor would precipitate similar action on the part of other creditors, which would lead to wasteful strife and controversy which plaintiff believes can be avoided and this property preserved for equitable distribution among those entitled thereto only by the intervention by the Court of Equity and the granting of equitable relief, including the appointment of a Receiver to take charge of and preserve the property of the defendant, continue its operation and collect and receive and properly appropriate the income thereof until the final decree of the Court in the premises, which said appointment of a receiver is in the judgment of the plaintiff imperatively necessary.

Wherefore, inasmuch as the plaintiff has no adequate remedy at law for the aforesaid grievances, and can have relief only in equity, the plaintiff has filed this bill in behalf of itself and other creditors of defendant, who may come in and contribute to the prosecution of this suit, and prays for equitable relief as follows:

1. That the rights of the plaintiff and all of the creditors of defendant may be ascertained and decreed, and that the Court will fully administer the fund in which the plaintiff is interested, including all the assets of the defendant, and will for such pur-

pose marshal all said assets, and ascertain the several and respective liens and priorities existing thereon, and enforce and decree the rights, liens and equities of the creditors of the defendant as the same may be finally ascertained and decreed by the Court, upon respective interventions or applications of each and every such creditor or lienor in and to each and every portion of the assets and property of the defendant.

2. That, for the purpose of preserving the defendant's system and protecting it from dismemberment, a Receiver may be appointed for the said defendant and all of the property of the defendant, real, personal and mixed, including all rights of the defendant as lessor of the traction properties now under lease to and operated by the Idaho Traction Company, with the right to receive all rents and moneys accruing to said defendant under said lease, with full power to issue for collection, receive and take into his possession goods, chattels, rights, credits, moneys; effects, lands, tenements, books, papers and property of every description of defendant Railway Company, and with all the incidental powers of Receivers in like cases and with full power and authority to operate the electrical, generating, transmitting and distributing system of defendant, and to collect and receive all rents, issues, profits and income thereof, and to apply the same and the receipts therefrom under the orders or decrees of the Court, for such period as the Court shall order, to protect and preserve the corporate franchises, privileges and property of the said defendant from being sacrificed under any proceedings

which can or may be taken, liable to prejudice or sacrifice the same, and to do any and all acts which may be necessary to preserve valuable rights and franchises of defendant and may be otherwise meet and proper.

3. That temporarily pending this suit, an injunction may issue against the defendant and all persons claiming and acting by, through or under it, and all other persons, to restrain them from interfering with said Receiver, taking possession of said property, or from further prosecuting or continuing any action against the said defendant or the said property, or any part thereof, all of which said suits are hereby stayed, to the intent and purpose that all such rights may be enforced in this suit.

4. That, if necessary to completely administer said estate, and to protect the rights in the properties, a sale of said properties may be ordered as a whole, and proceeds of the sale applied to the satisfaction of the claims of the creditors, including the plaintiff, in accordance with such rights and priorities as they may establish.

5. That a writ of subpoena may be granted to the plaintiff to be directed to the defendant, requiring the said defendant personally to appear on a certain day before the Court, and then and there to make full and true answer in the premises (but not under oath, which is hereby waived), and further do perform and abide by such other or further order, direction or decree as the Court shall consider meet.



6. That the plaintiff have such further and other relief as the Court may deem proper and equitable.

And the plaintiff will ever pray.

PERKY & CROW.

K. I. PERKY, BEN S. CROW,  
Solicitors for Plaintiff.

State of Idaho,  
County of Ada,—ss.

Benjamin S. Crow, being duly sworn, deposes and says that he is one of the solicitors for the plaintiff above named, that neither the said plaintiff nor any officer thereof resides within the district or state of Idaho, or within Ada County, wherein resides this affiant, its solicitor; that, therefore, he makes this affidavit in its behalf; that he has read the foregoing bill of complaint and knows the contents thereof; and that he verily believes the facts therein stated to be true.

(Seal) BENJAMIN S. CROW.

Subscribed and sworn to before me this 23rd day of Dec., 1913.

D. J. A. DIRKS,  
Notary Public.

Endorsed: Filed Dec. 23, 1913.

A. L. Richardson, Clerk.

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(Title of Court and Cause.)

ANSWER OF DEFENDANT IDAHO RAILWAY,  
LIGHT & POWER COMPANY.

*To the Honorable, the Judges of the District Court  
of the United States for the District of Idaho,  
Southern Division.*

*And now comes* the defendant, Idaho Railway, Light & Power Company, a corporation of the State of Maine, and a citizen of said State, and in answer to the bill of complaint of the plaintiff herein, or so much thereof as this defendant is advised is material and necessary for it to answer, and so answering, respectfully shows to this Honorable Court, and alleges:

*First.*

That it admits the allegations of the plaintiff's bill of complaint.

*Second.*

That it specifically admits the indebtedness alleged to be due from the defendant to the plaintiff. Admits it is unable to pay the same, and admits that it is unable to meet and pay its other obligations to its creditors or to maintain itself as a going concern, and that it is necessary that a receiver be appointed to conserve the assets of said defendant and to protect the interests of its creditors and of the public.

*Wherefore*, the defendant, having fully answered the said complaint according to its best knowledge and belief, submits its rights to this Honorable Court and prays that the Court may appoint a receiver as prayed for in the plaintiff's complaint and that the Court may grant to this defendant, as well as to the plaintiff, and all parties who may intervene in said cause, such relief as may be just and equitable in the premises.

And the defendant will ever pray.

IDAHO RAILWAY, LIGHT & POWER COM-  
PANY,

By O. G. F. Markhus,  
General Manager.

Attest:

JOHN F. MacLANE,  
Assistant Secretary.

JOHN F. MacLANE,  
Solicitor for defendant, Idaho Rail-  
way, Light & Power Company.

(Seal)

CAVANAUGH, BLAKE & MacLANE,  
Of Counsel.

Endorsed: Filed Dec. 23, 1913.

A. L. Richardson, Clerk.

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(Title of Court and Cause.)

ORDER APPOINTING RECEIVER.

And now on the 23rd day of December, 1913, this cause came on to be heard upon the bill of complaint and on the answer of the defendant thereto, this day filed, upon motion for the appointment of a receiver, both plaintiff and defendant being present and represented by their counsel, and the Court being advised.

It is *ordered, adjudged and decreed* that O. G. F. Markhus, of Boise City, Ada County, Idaho, be, and hereby is appointed receiver of the defendant, Idaho Railway, Light & Power Company, and all property of said defendant, real, personal and mixed, of whatsoever kind or description, and wheresoever situated,



including all its power stations, transmission and distribution lines and system, and its estate and interest as lessor of the electric railway or traction lines under lease to the Idaho Traction Company, of all buildings and appurtenances, electrical and other apparatus and equipment, tools, machinery, furniture, fixtures, materials, supplies, books of account, records and other books, papers and accounts, cash in bank, on deposit and in hand, money, debts, things in action, credits, stocks, bonds, securities, deeds, leases, contracts, muniments of title, bills receivable, rents, issues, profits, and income accruing and to accrue, together with all interest, easements, privileges and franchises, and all assets of every kind.

That the said receiver be and hereby is authorized immediately to take possession of said electrical, generating, transmitting and distributing plants and system, and to run, manage and operate the same, as will in his judgment produce the most satisfactory results, and also to exercise all the rights of the said Railway Company as lessor of the said traction system, collecting and receiving the rents and profits thereof, according to the terms of the lease. From said Idaho Traction Company, and to continue said operation of both said power and traction properties in the same manner as at present, and to discharge in all respects the public duties obligatory upon said defendant, and preserve and protect said system in proper condition and repair, and protect title and possession, and secure and develop the business of the same.

That the said receiver is hereby authorized and empowered to employ, discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees; to make such payments and disbursements as may be needful and proper in so doing. That said receiver be and is hereby authorized to collect rents, incomes, tolls, and profits of said property, and to make appropriate payments therefrom on account of accruing necessary charges of all kinds, being empowered for such purposes to borrow money if needful, in his judgment, in order to comply with this direction, and also, so far as may be needful, to pay off current bills for labor and supplies, but in all cases first obtaining the approval and authorization of this Court; to pay any and all loans thus contracted for, and reserving to this Court the power to authorize upon proper application the borrowing of money for other purposes. And said receiver is hereby authorized, in his discretion, from time to time out of funds coming into his hands, to pay the expenses of operating said property and executing his said trust, and all taxes and assessments upon said properties, or any part thereof, and also subject to approval by the Court to pay and discharge all claims arising from the previous operation of said company as in his judgment, on examination, are proper to be paid as expenses of operation, and the current and unpaid payrolls and vouchers, and supply accounts, incurred in the operation of said property at any time within four months prior hereto; that said receiver is hereby required to open prop-

er books of account wherein shall be stated the earnings, expenses, receipts and disbursements of his said trust and preserve proper vouchers for all payments by him made on account thereof.

It is further ordered that the said receiver give bond in the sum of fifty thousand dollars (\$50,000), conditioned that he will well and truly perform the duties of his office and will duly account for all moneys and property which may come into his hands, and abide by and perform all things which he shall be directed to do, with sufficient sureties to be approved by the judge of this Court, and that said bond be forthwith filed in the office of the Clerk of this Court.

And it is further ordered that each and every of the officers, directors, agents and employees of the defendant, Idaho Railway, Light & Power Company, and all other persons whomsoever, be and are hereby required and commanded forthwith, upon demand of said receiver, or his duly authorized agent, to turn over and deliver to said receiver or agent, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys, or other property of the said defendant, Idaho Railway, Light & Power Company, in his, or in their hands, or under his or their control. And each of said officers, directors, agents and employees is hereby commanded and required to obey such orders as may be given to them from time to time by said receiver, or his duly constituted representative, in conducting the operation of said property, and in discharging his duties as receiver.



And the said defendant, Idaho Railway, Light & Power Company, and its officers, directors, agents and employees and all other persons claiming to act by, through or under it, or them, and all said persons whomsoever, are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the receiver is hereby appointed, or interfering in any way to prevent the discharge of his duties by said receiver, or his operation of said property. And all persons having claims against said defendant, whether action is now pending thereon or not, are hereby restrained and enjoined from commencing or further prosecuting or maintaining said action, except by leave first had and obtained from this Court, and all pending actions are hereby stayed.

Any party in interest or any other person who, by intervention, may become party to this cause, may apply either for modification of this order or for further direction.

Dated December 23, 1913.

FRANK S. DIETRICH,  
United States District Judge for the District of  
Idaho, Southern Division.

Endorsed: Filed Dec. 23, 1913.

A. L. Richardson, Clerk.

(Title of Court and Cause.)

BILL OF INTERVENTION.

JOHN A. ROEBLING'S SONS COMPANY OF CALIFORNIA.

*To the Honorable the Judge of the District Court of the United States for the Southern District of Idaho, Southern Division.*

Your intervenor, John A. Roebling's Sons Company of California, a citizen of the State of California and a resident of said state, by leave of Court first had and obtained, and pursuant to the order of said Court heretofore made in the above entitled consolidated actions authorizing and directing all creditors having claims against the said defendant, the Idaho Railway, Light and Power Company, to intervene in said cause on or before the 30th day of April, 1913, now presents this, its Bill of Intervention, in said consolidated actions and its complaint and petition for allowance of its claim against the Idaho Railway, Light and Power Company, said corporation defendant, as a preferential claim, and represents and shows to your Honors as follows:

I.

That your intervenor is a corporation organized and existing under and by virtue of the laws of the State of California, having offices and places of business in the City of San Francisco, State of California, and in the City of Portland, State of Oregon, and it is and at all the times herein mentioned was engaged in the business of selling wire and wire rope used for the construction of street railways and interurban

roads and power transmission lines on the Pacific Coast, and for use in the State of Idaho.

## II.

That the defendant in the above entitled action, Idaho Railway, Light and Power Company, is a corporation duly incorporated under and by virtue of the laws of the State of Maine and at all times herein mentioned and since the year 1911 has been and now is the owner of various street railways and interurban railways and power plants in the Counties of Ada and Canyon and Owyhee, in the State of Idaho, and has been and is engaged in the maintenance and operation of said street railways and interurban electric lines and power plants more specifically, to-wit: The Street Railway system in the City of Boise, the interurban lines extending therefrom to the towns of Nampa and Caldwell and intermediate points; and the power plant at Swan Falls, Idaho, together with power transmission line from said Swan Falls to the pumping plants of the Gem Irrigation District distant therefrom about thirty miles and located in Owyhee County in said State. That said defendant at all times herein mentioned has been and is the owner and maintains and operates the lighting plants in the towns of Nampa and Caldwell in said State. That said defendant received a large income, profit and earnings from the operation of said roads and power plants herein described and referred to.

## III.

That on or about the 23rd day of December, 1913, plaintiff in the above entitled action, Westinghouse



Electric and Manufacturing Company, filed its complaint and bill in the above entitled action wherein it is alleged that defendant Idaho Railway, Light and Power Company was indebted to the plaintiff in the said cause in the sum of forty thousand (\$40,000) dollars, or thereabouts, and it is further alleged in said complaint and bill that said defendant was at said time indebted to various other creditors of said defendant corporation in large sums of money and that various suits had been or were about to be filed against said defendant by various creditors of said corporation and attachments thereon issued and levied upon the property of said defendant and that said defendant corporation had defaulted in the payment of its debts and was unable to pay the same and was insolvent, all of which will appear more specifically from the allegations of said complaint which are hereby referred to and by reference made a part of this petition for such purpose only; and in said complaint and bill the plaintiff did further pray by reason of the allegations therein set forth for an order of this Court appointing a Receiver to take possession of all of the properties of the defendant corporation, preserve and maintain and operate the same for the protection and benefit of the creditors of said corporation, as their rights might appear; and thereafter on or about said 23rd day of December, 1913, and after answer filed in said cause, which is also referred to and by such reference made a part of this petition, said Court by order duly and regularly given and made, granted said prayer of said

complaint for the appointment of a Receiver of the properties of said defendant corporation and by said order appointed O. G. F. Markhus Receiver of the properties of said defendant corporation hereinbefore and in said complaint described and thereupon said O. G. F. Markhus qualified as such Receiver by giving the bond required by order of said Court and by filing in said Court his oath of office and said bond was thereupon approved by said Court and said O. G. F. Markhus thereupon became and ever since has been and now is the duly appointed, acting and qualified Receiver of the said defendant Idaho Railway, Light and Power Company and of the properties thereof.

#### IV.

That in the month of January, 1914, the Guaranty Trust Company of New York, a corporation, brought its bill of equity in this Honorable Court against the said Idaho Railway, Light and Power Company, a corporation, and other defendants, which being action number 470 in equity in this Court, wherein the plaintiffs therein alleged the issuance and sale of bonds of said corporation in the sum of seven million, two hundred and fifty-five thousand (\$7,255,000) dollars secured by mortgage upon property of said corporation, fully set out and described in said bill of complaint, which said mortgage is alleged to have been made, executed and delivered to the said Guaranty Trust Company of New York, plaintiff in said cause, on the 1st day of December, 1911, and further alleging default in the per-

formance of certain conditions and covenants of said mortgage and that the whole of said issue of said bonds so outstanding of the alleged face and par value of seven million, two hundred and fifty-five thousand (\$7,255,000) dollars, with interest thereon from the 1st day of December, 1913, at the rate of five per cent. (5%) per annum, to the time of the filing of said bill in equity, was due and payable thereon, and praying that the whole of said property described in said bill of complaint be declared by the Court to be subject to the alleged lien of said mortgage and that said mortgage be foreclosed and said property sold in one parcel under decree of said Court and that the par and face value of said bonds issued and sold as alleged in said complaint, together with interest thereon, be paid from the proceeds of said sale.

#### V.

Your intervenor hereby makes reference to the original bills of complaints in the respective actions hereinabove entitled and prays leave to refer to the same as exhibits thereof to the same effect as if the said bills of complaint, or copies thereof, were attached hereto or filed herewith or stated at length herein.

#### VI.

Your intervenor further shows to your Honors that it has an interest in the said property of said Idaho Railway, Light and Power Company, described in said bill of complaint and in said cause of the Guaranty Trust Company of New York, plaintiff, vs.



said Idaho Railway, Light and Power Company et al., defendants, in which it claims an equity and prays this Honorable Court to declare said interest and claim to be superior in right to the interest or claim or lien of said Guaranty Trust Company of New York, plaintiff in said action, in or to or upon any of the property described in said bill of complaint or the proceeds thereof; and, in this behalf, intervenor alleges and shows to said Court as follows:

That in or about the months of March, April and May, 1913, to-wit, between the dates of the 18th of March and about the 30th day of May, 1913, the intervenor herein, John A. Roebling's Sons Company of California, sold and delivered to defendant herein, Idaho Railway, Light and Power Company, a corporation, merchandise, to-wit, copper wire of the value of \$38,577.17, which sum said defendant agreed to pay for the same in cash. That the particulars of said account, the quality and amount of said material, the date of sale thereof and the price which the defendant agreed to pay for the same are more particularly set forth in a statement of said account, a copy of which is hereto attached and referred to and by such reference made a part of this petition. That the sum of \$17,519.80 has been paid on account of said indebtedness and no more, and the balance of said sum, to-wit, the sum of \$21,057.37 together with the sum of \$946.26 interest thereon from date of said sale is now due, owing and unpaid from said defendant to this intervenor.

## VII.

That your intervenor claims a preference in regard to said claim and that the said debt of defendant to this intervenor, as herein set forth, should be preferred in order of payment either out of the income property of said defendant in the possession and under the control of said Receiver or out of the proceeds of the sale thereof as against the claims of mortgage bond holders and other creditors of said defendant; and your intervenor alleges that the facts upon which it bases this claim for preference over other debts and mortgage bonds of said defendant are as follows:

That the said merchandise and material and supplies sold by intervenor to said defendant, as herein alleged, consisted of copper wire to be used in the construction, maintenance and repair of some of the electric or power transmission lines of said defendant, above referred to, and at the time of the sale thereof the said wire was necessary for use of said defendant in the construction, alteration or repair of said power transmission lines of said defendant and that said wire was actually used in the construction and repair, and is still being used in the maintenance and operation of said electric or power transmission systems of said defendant and all of the same is and at all times since the sale thereof was necessary to the continued maintenance and operation of the power transmission systems of the defendant, and the earnings of said property in the possession of said Receiver or the portion thereof in the construction of

which the material herein referred to was used, are derived from the use of said material so sold to defendant, as herein alleged, and without which said properties could not be operated or any earnings derived therefrom.

That all of said material and supplies sold, furnished and delivered to said Idaho Railway, Light and Power Company, as herein alleged, were necessary for the use of said corporation in keeping and preserving the said mortgaged property, or some part thereof, in operative condition and were necessary to the maintenance and operation thereof, and said material and supplies did thereby enhance the value of said property and added to the security of the bond holders thereof and said account of said intervenor for said material and supplies was one of the current debts and expenses of the maintenance and operation of said property.

### VIII.

Further in this behalf, your intervenor alleges and respectfully shows to said Court that said material and supplies so furnished, as herein alleged, to said Idaho Railway, Light and Power Company and used in the repair, maintenance and operation of defendant's properties, as described herein and in said bills of complaint above referred to, were of such character as to entitle said intervenor, under the laws of the State of Idaho, to claim and assert a mechanics lien upon the property of said defendant, Idaho Railway, Light and Power Company, described herein and in said bills of complaint in said above entitled



actions, superior in right and order of precedence of payment to the alleged lien of the said mortgage given to secure said bonded indebtedness described in said complaint for foreclosure thereof; and that said intervenor did not file any lien upon said property under the laws of the State of Idaho for the reason that upon the request of said Idaho Railway, Light and Power Company and by agreement made between your intervenor and said last mentioned corporation on or about the 20th day of May, 1913, to the effect that if your intervenor herein should and would refrain from filing and asserting a mechanics lien upon the property of said corporation, the Idaho Railway Light and Power Company, for the amount and value of said material and supplies herein described, the said Idaho Railway Light and Power Company, would and did waive the failure to file and assert said lien and would treat and consider the amount of said claim for the value of said material and supplies as a superior and preferred claim upon the said property to the same extent as if a lien were filed and asserted thereon under the laws of the State of Idaho, and that said Idaho Railway Light and Power Company, its officers and agents, in consideration of defendant failing and refraining from filing said lien, promised and agreed to pay for said material and supplies promptly and as a preferred claim out of the income and receipts of said corporation.

#### IX.

Your intervenor further shows and represents to your Honors that large sums of money received by

said Idaho Railway Light and Power Company as income from the operation of the properties of said corporation subsequent to the sale and delivery thereto by said intervenor of the material and supplies herein described, have been diverted from the funds of said corporation available for the payment of said accounts of this intervenor as follows: That subsequent to the sale and delivery of the material and supplies herein referred to, the said Idaho Railway Light and Power Company has paid interest upon the said mortgage bonds held by the said Guaranty Trust Company of New York, an amount which your intervenor is informed and believes and therefore alleges to be the interest thereon for the period of one year, to-wit, the sum of three hundred and sixty-two thousand, seven hundred and fifty (\$362,750) dollars, and that the said sum of money so paid as interest upon said mortgage bonds, or so much thereof as was necessary for payment of current indebtedness for material and supplies should have been used and applied by said corporation to pay its current expenses for maintenance and operation and repair of its properties described in said complaint, including the account of your intervenor herein; but on the contrary, and notwithstanding the fact, that the material and supplies so sold and delivered by intervenor, as herein alleged, to the said Idaho Railway Light and Power Company has been added to the property of said corporation and has increased the value thereof and the security of the holders of said mortgage bonds to the extent of the value of said

material and supplies so sold and delivered, the income and revenue derived from the operation of said properties, and due in part to the use of the said material and supplies, has been by said corporation paid to the said Guaranty Trust Company of New York, as trustee on account of interest upon said bonded indebtedness.

### X.

The intervenor further and upon information and belief shows and represents to said Court that if the properties, estates, premises, rights, contracts, privileges, equipment and franchises, described in the said bill of complaint of said Guaranty Trust Company of New York, trustee herein, be declared subject to the lien of said mortgage set forth and described in said bill of complaint and the same be foreclosed and sold by decree of this Court as prayed for in said complaint, the same could not be sold for a sum sufficient to discharge and pay the mortgage bond indebtedness claimed and alleged in said complaint of said Guaranty Trust Company of New York, trustee, to be due and payable under said mortgage and in this respect your intervenor alleges that it is without adequate remedy at law for the injury complained of in this bill of intervenor, and therefore seeks the equitable intervention of this Honorable Court.

In consideration whereof and inasmuch as your intervenor is without remedy at law, and can only have relief in a court of equity, your intervenor prays the aid of this Honorable Court as follows:



1. That it may further please your Honors to grant an order herein directing that upon the filing of this bill of intervention, copies of the same may be served upon and delivered to the solicitors of the respective parties to said above entitled causes within such reasonable time as may be fixed by your Honors, and that the complainants and defendants therein have such time as may be fixed by this Honorable Court within which to appear and answer all and singular the matters hereinbefore stated as fully and particularly as if they were thereunto duly interrogated but not under oath; answer under oath being hereby expressly waived.

2. That it be declared, adjudged and decreed that the said Idaho Railway Light and Power Company is indebted to your intervenor in the sum of \$21,-057.37, as alleged herein, and that the said claim and account of your intervenor for said sum of \$21,-057.37 be by this Honorable Court declared and determined to be a preferential claim against said Idaho Railway Light and Power Company and that the same be further declared to be a lien upon the property of said company, herein and in said bill of complaint of said Guaranty Trust Company of New York, trustee, more fully described, and that the said claim and lien of your intervenor be declared to be a first and prior lien thereon and superior to any lien or claim of right, title or interest of said Guaranty Trust Company of New York, trustee, plaintiff in said above entitled action, or of any of the owners or holders of said bonds issued under said

mortgage to said Guaranty Trust Company of New York, trustee, or of any other persons or parties or claimants herein.

3. That said Receiver, O. G. F. Markhus, be directed to pay said account, and the whole thereof, from the income received by said Receiver from the operation of the said properties described and referred to herein, if said income be sufficient for said purpose.

4. That if the said properties described in said bill of complaint of said Guaranty Trust Company of New York, be sold under any decree of foreclosure of this Honorable Court, it be adjudged, declared and decreed and that the said claim and account of your intervenor in the sum of twenty-one thousand and fifty-seven and 37-100ths (\$21,057.37) dollars be paid and the said Receiver be directed to pay the same and the whole thereof from the proceeds of said sale before applying any portion thereof in payment of the claims of said mortgage bond holders described in said bill of complaint of said Guaranty Trust Company of New York, trustee, herein.

5. That your intervenor may have such other and further relief in the premises as may be just and equitable and as to your Honors may be deemed meet.

BEVERLY L. HODGHEAD,

Solicitor for John A. Roebling's Sons Company  
of California, a corporation, Intervenor.

RICHARDS & HAGA,

McKEEN F. MORROW,  
of Counsel.

State of California,

City and County of San Francisco,—ss.

S. V. MOONEY, being first duly sworn, deposes and says: I am an officer, to-wit, the President and Manager of John A. Roebling's Sons Company of California, a corporation, intervenor herein, and I have read the foregoing bill of intervention and know the contents thereof and that the same is true of my own knowledge except as to the matters which are therein stated on information or belief and as to those matters I believe it to be true.

S. V. MOONEY.

Subscribed and sworn to before me this 21st day of March, 1914.

LYDA COHN,

Notary Public in and for the City and County of San Francisco, State of California.

(Seal)

Lodged in Clerk's office March 25, 1914 and filed March 25, 1914.

A. L. RICHARDSON, Clerk.

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(Title of Court and Cause.)

STIPULATION OF FACTS ON BILL OF INTER-  
VENTION OF JOHN A ROEBLING'S SONS  
COMPANY OF CALIFORNIA.

It is hereby stipulated by and between John A. Roebling's Sons Company of California, hereinafter styled Intervener, and O. G. F. Markhus, as Receiver for Idaho Railway Light and Power Company, hereinafter referred to as the Railway Company, that the



Intervener need not answer the Bill of Complaint in this cause, or in cause No. 468, with which this cause is consolidated, nor need the Receiver answer the Bill in Intervention, and its rights shall not be in any way prejudiced by failure to so answer.

The allegations of the address to the Court and of Paragraphs I, II, III, IV, V and VI of said bill in intervention are admitted and agreed to be true and correct save and except the claim of preference asserted in said Paragraph VI is not to be regarded as foreclosed by this admission.

With respect to the remaining allegations of said Petition in Intervention, the facts are agreed to be as follows:

That between the 18th of March, 1913, and the 30th of May, 1913, the intervenor sold and delivered to the Railway Company which was then a going concern, the supplies and material mentioned in its Bill in Intervention, and scheduled in the exhibit attached thereto, for which said supplies and material the Railway Company agreed to pay the sums specified in said exhibit. That it was intended and agreed between the parties that the sale should be a cash transaction within ordinary commercial usage, and that the price thereof should be paid by the Railway Company, on bills as rendered within thirty days from the delivery of the various items specified. That, as stated in Paragraph VI of said Bill in Intervention, no part of such price has been paid by the said Railway Company or by its receiver, save and except that the Railway Company paid, prior to the

appointment of receiver, the sum of \$17,519.80 on account, and there is due as a balance the sum of \$21,-057.37, together with \$936.26 interest, as stated. That the intervener sold said supplies and material on the open current account of the Railway Company in the belief and in the intention, on the Intervener's part, that the same should be paid out of current operating income.

That during the period when said supplies were furnished, the said Railway Company was setting up reserves from its earnings and from the proceeds of sale of its bonds to pay bond interest. That the interest accruing upon the bonds of said Railway Company on June 1st, 1913, was \$165,750.00. That in the six months preceding that date the following bond interest reserves from said sources were set up.

Dec. 1912—deposit reserve.....	\$ 24,345.83
Jan. 1913—deposit reserve.....	26,746.00
Feb. 1913—deposit reserve.....	25,545.65
Mar. 1913—deposit reserve.....	31,029.16
April 1913—deposit reserve.....	26,916.66
May 1913—deposit reserve.....	1,166.70
<hr/>	
Total .....	\$135,750.00

That the balance of the sum required to meet such interest, to-wit, \$30,000.00 was borrowed May, 1913, on the Company's note, from Kissel, Kinnicutt & Company, and in addition to the foregoing interest reserves the Railway Company on April 1, 1913, paid from its earnings the interest on its underlying bonds of the Boise & Interurban Railway Company,

amounting to \$26,825.00, and on June 1 the interest on the bonds of the Boise Railroad Company, amounting to \$9,725.00. That of the foregoing interest reserves about \$79,000.00 was obtained and set up from the earnings of the Company during said period, and \$56,750.00 from the proceeds from the sale of bonds.

That at the time these supplies and this material was furnished, the Railway Company was engaged in the construction of a transmission line approximately 30 miles in length from its central station at Swan Falls on Snake River to the pumping plant of the Gem Irrigation District, also on the Snake River, in Owyhee County, Idaho, with a branch extension four miles in length from a point about midway on said line to the so-called Guffey pumping station in Owyhee County, Idaho. Prior to this time there had been no transmission line between these points.

That before the construction of this line the Railway Company and its predecessors in interest had been for over ten years generating power at its Swan Falls plant, and had a transmission line extending from such plant to the mining districts in and around Silver City in Owyhee County, Idaho, and another transmission line to the cities of Nampa, Caldwell and Boise in Canyon and Ada counties, Idaho. That during the fall of 1912 and the winter of 1913 it was enlarging the capacity of its Swan Falls plant by replacing three 300 KW generating units by two 1250 KW units, with the foundations, wheel pits, gates and tail races for two additional 1250 KW units to



be installed in the future. That this line, then under construction, was constructed from the Swan Falls station for the purpose of serving irrigation customers with whom contracts had been made, having a present estimated demand of about 2,000 horse power, and an ultimate estimated demand of about 6,000 horse power. That these contracts were made with a view to utilizing the increased capacity of the Swan Falls central station as thus enlarged. The Gem District line was constructed direct from the station to the points of use, and did not branch from either of the pre-existing lines.

That at the same time that this Gem District line was under construction the Railway Company was the owner of a controlling interest in the stock of the Idaho-Oregon Light & Power Company, and was likewise heavily interested in the bonds of that Company, which said stock and bonds were pledged as collateral trust security under the mortgage to the plaintiff, Guaranty Trust Company, and was consequently interested in its finances and the development of its business and properties. That the Idaho-Oregon Light & Power Company defaulted upon its interest upon its bonds April 1st, 1913, and the Railway Company had offered to the bond holders of said Idaho-Oregon Light & Power Company a plan of reorganization which contemplated, among other things, the maintenance of the Idaho-Oregon Light & Power Company as a going concern and an exchange of the securities of the Companies. That said Idaho-Oregon Company had made various service

contracts, largely for irrigation, involving the construction of a number of extensions from its existing system to various points in Canyon and Washington Counties, Idaho, and Malheur County, Oregon, such extensions being from one to five or six miles in length, scattered over the territory, and being of the character of ordinary service extensions such as any Power Company engaged in the conduct of its business as a public service corporation would be expected and required to make from year to year as its territory developed.

That the material required for such extensions was purchased by the Railway Company and was furnished to the Idaho-Oregon Company under an agreement termed an "equipment trust," by which the Railway Company reserved title to the supplies and material so furnished until the same should be paid for.

That the material and supplies furnished by the intervener, as alleged in its Bill of Intervention, and as described in the exhibit attached thereto, was furnished for and used and devoted by the Railway Company to the following purposes: (The items are identified by the numbers of the invoices as shown in the exhibit to the Bill in Intervention.)

<i>Item No.</i>	<i>Description</i>	<i>Price</i>
39227-Q	This material was copper wire of the quantity specified in the exhibit, and was used by the Railway Company in the service extensions for the Idaho-	\$ 3,439.02

Oregon Company mentioned above as Equipment Trust Extensions.

39334-Q	Guy wire, likewise furnished to the Idaho-Oregon Company under said Equipment Trust Extensions.	77.88
40287-Q	Wire used in the installation of the new or replacement units in the Swan Falls plant hereinbefore referred to, replacing the old small units.	41.15
40387-Q	Copper transmission wire used in the construction of the Gem District transmission line.	11,612.66
40128-Q	Telephone wire used in the construction of the telephone line on the Gem District transmission line.	142.56
	This item also includes freight	26.06
40150-Q	Transmission wire used in the construction of the Gem District line.	5,319.30
40183-Q	Copper wire used in the construction of the Gem District line.	5,912.72
40445-Q	Copper wire used in the construction of the Guffey branch of the Gem District transmission line.	616.03



40440-Q	This material was furnished for use in connection with general service extensions of the Railway Company in its distributing system in and around the unincorporated village of Eagle in Ada County, Idaho.	1,121.15
40750-Q	These supplies were furnished by the Railway Company to the Idaho-Oregon Company under the Equipment Trust Agreement above mentioned.	1,428.57
40744-Q	Wire used in the installation at the Swan Falls plant of the new units replacing the small units.	23.95
41849-Q	Wire furnished by the Railway Company to the Idaho-Oregon Company under the equipment trust agreement.	1081.30
41858-Q	Copper-clad steel wire used in the construction of the Gem District transmission line, either on the power line or on the telephone line connected therewith and erected on the same poles.	2490.94
41869-Q	Wire furnished by the Railway Company to the Idaho-Oregon Company under the equipment trust agreement.	4519.87

41979-X	Wire used at the Swan Falls plant in the installation of the new units replacing the small units.	26.72
4 MHD	Wire used in the construction of bare the Guffey branch of the Gem copper District transmission line. wire.	697.29

All of the said wire has actually been delivered by the interveners to the Railway Company, and devoted by the Railway Company to the purposes above specified, and is in use by the Railway Company, (or by the Idaho-Oregon Company under said equipment trust agreement), as a part of its existing system, and has become a part of the Railway Company's system, has enlarged the same, and has contributed to the earnings and to the value of the properties and the security of the bonds, and said material is and was necessary to the continued maintenance and operation of the respective parts of said property for which the same was supplied and in which it is used.

For the purposes of this hearing it is admitted that the Idaho Railway Company's property will not sell for the amount of the mortgage indebtedness.

BEVERLY L. HODGHEAD,  
Solicitor for John A. Roebling's Sons Co.  
of California, Intervener.

JOHN F. MacLANE,  
Solicitor for Receiver.

Endorsed: Filed June 19, 1914.

A. L. Richardson, Clerk.

(Title of Court and Cause.)

CROSS-BILL OF I. P. MORRIS COMPANY  
AGAINST GUARANTY TRUST COMPANY  
OF NEW YORK, TRUSTEE, IDAHO RAIL-  
WAY, LIGHT AND POWER COMPANY, AND  
O. G. F. MARKHUS, RECEIVER OF IDAHO  
RAILWAY, LIGHT AND POWER COMPANY.

*To the Honorable, the Judges of the District Court  
of the United States for the District of Idaho,  
Southern Division:*

And now comes the above named defendant, I. P. Morris Company, and, by leave of this Honorable Court first had and obtained, files this its cross-bill herein against the plaintiff Guaranty Trust Company of New York, Trustee, and the defendant Idaho Railway, Light and Power Company and O. G. F. Markhus, Receiver of said Idaho Railway, Light and Power Company. And thereupon this cross-complainant shows and alleges:

I.

That at all the times hereinafter mentioned this cross-complainant was and now is a corporation duly organized and existing under the laws of the State of Pennsylvania, and is a citizen of said State, and a resident of the Eastern District of said State of Pennsylvania.

That the said Guaranty Trust Company of New York, Trustee, plaintiff in the original suit, but one of the defendants to this cross-complainant's cross-bill, now is and during all the times hereinafter mentioned was a corporation organized under the laws



of the State of New York, and is a citizen and resident of the State of New York with its principal place of business in the City of New York.

That at all the times hereinafter mentioned the defendant Idaho Railway, Light and Power Company (hereinafter sometimes called the "Railway Company") was and now is a corporation organized and existing under the laws of the State of Maine, and is a citizen of said State and a resident of the District of Maine, and is and has been doing business in the State of Idaho under and by virtue of a compliance with the laws thereof relative to foreign corporations doing business in such State.

That the said O. G. F. Markhus now is and ever since the 23rd day of December, 1913, has been the duly appointed, qualified and acting Receiver of the said Idaho Railway, Light and Power Company, having been appointed Receiver of said corporation in a suit brought in the United States District Court for the District of Idaho, Southern Division, by the Westinghouse Electric and Manufacturing Company, a corporation, against the said Idaho Railway, Light and Power Company.

## II.

That on the 14th day of January, 1914, the said Guaranty Trust Company of New York, Trustee, filed its bill of complaint in this court against the said Idaho Railway, Light and Power Company, Idaho Traction Company, Westinghouse Electric and Manufacturing Company, and E. H. Jennings for the foreclosure of a mortgage or deed of trust, alleged

to cover all the property, real, personal and mixed, of the said Idaho Railway, Light and Power Company; and thereafter such proceedings were had therein that this defendant and cross-complainant I. P. Morris Company was made a party defendant to said suit upon the petition of the said Guaranty Trust Company of New York. And thereafter and on the 25th day of March, 1914, the said Guaranty Trust Company of New York, Trustee, filed its amended bill of complaint in said cause. That said suit is still pending in this court, and for a more particular statement of the relief therein sought by the said Guaranty Trust Company of New York, Trustee, and the proceedings therein had, reference is hereby made to the records and files in said cause.

### III.

That on or about the 31st day of October, 1912, this cross-complainant entered into a contract with the said Railway Company, wherein and whereby this cross-complainant agreed to furnish the Railway Company the following machinery, to-wit:

Two 1750 horse-power turbine water wheels  
to be installed at the said Railway Company's power plant at Swan Falls, Idaho;

One 350 horse-power exciter turbine to be  
used in connection with said equipment and  
said power plant;

Two I. P. Morris governors, with central  
pumping plant, for the main units above  
mentioned;

One Lumbard governor for the exciter turbine;

One set of spare parts for the main units above mentioned;

One set of spare parts for the main unit governors;

One set of spare parts for the exciter unit above mentioned;

and agreed to do certain work in connection with the installation of said machinery; that such machinery was to be installed and such work performed at what is known as the Swan Falls Power Plant of the Railway Company at Swan Falls, Idaho. That the contract price and the reasonable value of said machinery and the work and labor to be performed by this cross-complainant in installing the same was Forty-four Thousand Five Hundred Dollars (\$44,500.00).

That pursuant to such contract this cross-complainant furnished such machinery and performed the work and labor required in connection with the installation thereof, and furnished certain other machinery ordered by the Railway Company and required in connection with the operation of the said Swan Falls Power Plant and the generation of electric energy thereby; that such machinery was all furnished and such labor performed at the special instance and request of the said Railway Company during the year 1913, and within six months prior to the appointment of the said O. G. F. Markhus as Receiver of the said Railway Company.



That the said Railway Company agreed to pay for such machinery and labor in installments as follows, to-wit:

Twenty-five per cent. (25%) of the value of each shipment as the same was shipped from the plant or works of this cross-complainant;

Twenty-five per cent. (25%) of the value of each shipment upon its arrival at Swan Falls, Idaho;

Twenty-five per cent. (25%) of the value of each main unit with its auxiliaries after test had been made and units had been found to meet the guarantees;

Twenty-five per cent. (25%), or the final payment, to be made within one hundred twenty (120) days after the receipt of the machinery and equipment at Swan Falls, Idaho.

That the said Railway Company wholly failed to make said payments according to the terms of its said contract, but on or about the 9th day of December, 1913, such machinery and work was accepted by the Railway Company, and it was agreed that there was then due this cross-complainant for and on account of such machinery and labor the sum of Forty-eight Thousand Three Hundred Thirty-five and 37/100 Dollars (\$48,335.37); and the said Railway Company thereupon on or about the said 9th day of December, 1913, paid this cross-complainant the sum of Twenty-one Thousand Two Hundred and 66/100

Dollars (\$21,200.66) in cash and gave two promissory notes, each for the sum of \$13,246.58 and each bearing date the 9th day of December, 1913, one due in three months and the other in six months after date, and each bearing interest at the rate of six per cent. (6%) per annum from date thereof. That on or about the 15th day of January, 1914, a further cash payment of \$111.40 was made on said account; that no other or further payments have been made on said account, and that there now remains due and unpaid the two promissory notes aforesaid and \$530.-15, not represented by said notes. That the said notes were taken simply as evidence of the indebtedness represented thereby, and said notes were not given or received in payment of the balance of said account, and neither of said notes has been paid.

#### IV.

That the machinery so furnished by this cross-complainant was used by the said Railway Company in the construction, maintenance and repair of its hydro-electric power plant, situated at Swan Falls on Snake River in Owyhee County, Idaho, and the labor so done and performed by this cross-complainant in connection with the installation of said machinery was in connection with the repair of said hydro-electric power plant; that such machinery and labor was necessary for the use of said Railway Company in the construction, operation, maintenance and repair of said plant, and ever since the installation of said machinery and for several months last past the same has been used by said Railway Com-

pany and is now being used by the Receiver thereof for generating electric current furnished by the Railway Company and by said Receiver to the public and to the communities served by said Railway Company and its Receiver for operating the electric railway lines and cars owned and operated by said Railway Company.

That without such machinery and labor so furnished and rendered by this cross-complainant the Railway Company and its said Receiver would be unable to furnish electric power to its customers and to the communities served by such Company for heating, lighting, or other purposes, or for the operation of its railroad, city and interurban, lines, or for discharging its duties as a public service corporation; and such Railway Company and its Receiver would be unable to maintain and protect the franchises held and enjoyed and described in the amended complaint of the Guaranty Trust Company of New York, Trustee, in its suit for the foreclosure of its mortgage or deed of trust.

## V.

That the earnings of the Railway Company ever since the installation of said machinery, and the income and earnings of the property now in the possession of said Receiver, are largely, if not entirely, derived from the use and operation of the machinery so furnished and installed by this cross-complainant; and such machinery and the labor performed by the cross-complainant have greatly enhanced the value of the property of said Railway Company and the es-



tate in the possession of said Receiver. That the income and earnings of the Railway Company and of said Receiver from the machinery so furnished and from the labor so performed by this cross-complainant have been diverted and used for the payment of interest on the bonds issued by the Railway Company under the mortgage or deed of trust sought to be foreclosed by the Guaranty Trust Company of New York, Trustee, as aforesaid. That the earnings from such property aggregate a sum largely in excess of the amount due this cross-complainant, and if the same had been applied to the payment of this cross-complainant's account, as it should in equity and good conscience have been applied, it would long since have fully discharged and satisfied the claims of this cross-complainant, as aforesaid; but the earnings of such property, due to the furnishing of such machinery and the performance of such labor by this cross-complainant, have been diverted and used for other purposes, and particularly for the payment of interest on the bonds secured by the mortgage sought to be foreclosed by said Guaranty Trust Company of New York, and the amount so diverted and misapplied to the payment of such interest is largely in excess of the amount due this cross-complainant.

## VI.

That by reason of the premises this cross-complainant claims a prior lien and preferential claim upon the said Swan Falls Power Plant and all the property, rights and franchises of the said Idaho Railway, Light and Power Company, and on the in-

come and earnings of such property, prior and superior to the lien or claim of the said Guaranty Trust Company of New York, Trustee, under the mortgage or deed of trust now sought to be foreclosed against such property. And the earnings of all of said property and the proceeds thereof, in the event of a sale, should first be applied to the payment of the amount due this cross-complainant, as aforesaid; and this cross-complainant should be held and decreed to have an equitable lien or equitable mortgage upon all of the property of said Railway Company, prior and superior to the mortgage or deed of trust of the said Guaranty Trust Company of New York until the full amount of this cross-complainant's claim has been paid and discharged.

IN CONSIDERATION WHEREOF, and forasmuch as this cross-complainant is remediless in the premises according to the strict course of the common law, and can only have relief in a court of equity, this cross-complainant prays this Honorable Court for an order decreeing the claim of this cross-complainant a prior lien and preferential claim upon all the earnings, property, rights and franchises of the said Idaho Railway, Light and Power Company now in the possession and control of said Receiver, and particularly upon the said Swan Falls Power Plant and the earnings thereof, and that the said Receiver be ordered and directed to first pay the amount due this cross-complainant, as aforesaid, either from the earnings and income of the estate in his possession, or from the sale of such or such part of said estate

as may be necessary to raise the money required to satisfy and discharge the claim of this cross-complainant, and for such other and further relief in the premises as may be just and equitable.

And may it please your Honors to grant to this cross-complainant a writ or writs of subpoena and other process to be directed to the said Guaranty Trust Company of New York and to the said Idaho Railway, Light and Power Company and the said O. G. F. Markhus, its Receiver, and each of them, therein and thereby commanding them at a certain time and under a certain penalty, to be therein named, to be and appear before your Honors in this honorable court, then and there singularly and severally to answer all the matters aforesaid, but not under oath, such answer under oath being hereby expressly waived, and to perform such other orders and decrees as to your Honors may seem just and equitable.

I. P. MORRIS COMPANY,  
By OLIVER O. HAGA,  
Solicitor for Cross-complainant.

J. H. RICHARDS,  
McKEEN F. MORROW,  
Counsel for Cross-complainant,  
Residence: Boise, Idaho.

United States of America,  
District of Idaho,  
Southern Division,—ss.

OLIVER O. HAGA, being first duly sworn, deposes and says: That he is solicitor for the cross-



complainant, I. P. Morris Company; that neither the said cross-complainant nor any of its officers or agents reside within the District or State of Idaho, or within Ada County, wherein resides this affiant; that he makes this affidavit in its behalf because of the absence from the State of its officers and agents; that he has read the foregoing cross-bill and knows the contents thereof, and he believes the facts stated therein to be true.

OLIVER O. HAGA.

*Subscribed and Sworn to* before me this 9th day of May, 1914.

(Seal)

EDNA L. HICE,  
Notary Public.

Endorsed: Filed May 12, 1914.

A. L. Richardson, Clerk.

By E. B. Yarrington, Deputy.

(Title of Court and Cause.)

ANSWER ~~TO~~ <sup>OF</sup> GUARANTY TRUST COMPANY  
OF NEW YORK, TRUSTEE, TO CROSS-BILL  
OF I. P. MORRIS COMPANY.

*To the Honorable, the Judges of the District Court of  
the United States for the District of Idaho, South-  
ern Division.*

The cross-defendant, Guaranty Trust Company of New York, Trustee, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in the said cross-bill of the said defend-

ant I. P. Morris Company contained, for answer thereto, or to so much thereof as this cross-defendant is advised it is material or necessary for it to make answer to, says:

I.

That it admits the allegations as to incorporation of the corporate cross-defendants and as to the citizenship and residence of all of said defendants contained in paragraph one of said cross-bill herein.

II.

This answering cross-defendant does not know and has not been informed, save by the said cross-bill, whether or not on or about the 31st day of October, 1912, or at any other time or at all the cross-complainant entered into any contract with the said Railway Company to any effect whatsoever and particularly as to whether it entered into a contract wherein or whereby said cross-complainant agreed to furnish said Railway Company any or all of the machinery, articles or things mentioned in paragraph three of said cross-complaint or agreed to do any work in connection with the installation thereof or that such or any machinery was to be installed or such or any work performed at what is known as the Swan Falls Power Plant of the Railway Company at Swan Falls, Idaho, or at any other place or at all; or that the contract price or the reasonable value of said machinery and work and labor or all or any of them was \$44,500.00 or any other sum; or that, pursuant to such contract or at all, said cross-complainant furnished any machinery or performed any work

or labor in connection therewith or furnished any other machinery whether ordered by the Railway Company or not, or required or used in connection with the operation of said Swan Falls Power plant or at all or the generating of electric energy thereby; or that such machinery was furnished or such labor performed at the special instance or request of the said Railway Company during the year 1913 or at any other time or at all or within six months prior to the appointment of O. G. F. Markhus, as Receiver of said Company; or that the Railway Company agreed to pay for any machinery or labor or both the sums of money set forth in said paragraph three at any time or in any installments or at all; or that the said Railway Company wholly or at all failed to make any payments according to the terms of any contract; or that on or about the 9th day of December, 1913, or at any other time, or at all, such or any machinery or work or both were accepted by the Railway Company or that it was agreed that there was then, or at any other time, due said cross-complainant for or on account of any machinery or labor or both or at all the sum of \$48,335.37 or any other sum; or that the said Railway Company, on or about the 9th day of December, 1913, or at any other time, or at all, paid to cross-complainant the sum of \$21,200.66 or any other sum or gave two or any promissory notes each for the sum of \$13,246.58 or any other sum or sums or each bearing date the 9th day of December, 1913, or at any other time, or that one was due in three months or at any other time or that the other was

due in six months, or at any other time, after date, or that each or either or any of them bore interest at the rate of six per cent per annum or at all; or that on or about the 15th day of January, 1913, the further payment of \$111.40 or any other sum was made on said account, or at all; or that no other or further payments have been made on said account or that there now remains due or unpaid the said promissory notes aforesaid or any of them or the sum of \$530.15 not represented by any notes or at all; or that said notes were taken as evidence of the indebtedness represented thereby or the said notes were not given or received in payment of the balance of any account or that neither of said notes has been paid or any of the other matters set forth in paragraph three of said cross-bill; and this cross-defendant prays that said cross-complainant be required to make strict proof of each and all of the allegations contained in said cross-bill, particularly in paragraph three thereof in relation to the said contract therein referred to and the performance of the same as claimed by the said cross-complainant and of the sums of money therein alleged to be due.

### III.

This answering defendant does not know and has not been informed, save by said cross-bill of complaint, whether the machinery so claimed to have been furnished by said cross-complainant was used by said Railway Company in the construction or maintenance or repair of its hydro-electric power plant situated at Swan Falls on Snake River in Owy-



hee County, Idaho, or at any other place, or at all, or that the labor so averred to have been done and performed by cross-complainant in connection with the installation thereof was in connection with the repair of the said power plant; or the said machinery or labor was necessary for the use of said Railway Company in the construction or operation or maintenance or repair of said plant or at all; or that ever since the installation of any such machinery or for any time whatsoever, or at all, the same has been used by the said Railway Company or is now being used by the Receiver thereof for generating electrical current furnished by the Railway Company or at all or by said Receiver to the public or to the communities served by said Railway Company or at all; or by said Receiver for operating said electric railway lines or cars owned or operated by said Railway Company or at all; or that, without such machinery or labor so averred to have been furnished or rendered by said cross-complainant, the Railway Company or its said Receiver would be unable to furnish electric power to its consumers or to the communities served by such Company for heating or lighting or for any purposes or for the operation of its or any railway, city or interurban, lines or for discharging its duties as a public service corporation or at all; or that such Railway Company or its Receiver would be unable to maintain or protect the franchise held or enjoyed or described in the amended bill of complaint of this cross-defendant in its suit for the foreclosure of its mortgage or deed of trust; or any of the other mat-

ters set forth in the fourth paragraph of said cross-complaint and this defendant therefore prays said cross-complainant be required to make strict proof of each and all of the allegations of paragraph four of said cross-complainant.

#### IV.

This answering defendant does not know and has not been informed, save by said cross-complaint, whether the earnings of said Railway Company since the installation of said machinery as averred in said cross-complaint or that the income or earnings of the property now in possession of the Receiver are largely or at all derived from the use or operation of the machinery so averred to have been furnished or installed by said cross-complainant or that such machinery or the labor so averred to have been performed by the cross-complainant has greatly or at all enhanced the value of the property of said Railway Company or the estate in the possession of said Receiver or that any income or any earnings of the Railway Company or of said Receiver from the machinery so averred to have been furnished or from the labor so averred to have been performed by said cross-complainant have been diverted or used for the payment of interest on the bonds issued by said Railway Company under the mortgage or deed of trust sought to be foreclosed by this cross-defendant or at all, or that there are or have ever been any earnings whatsoever from such property or that if there ever had been any such earnings, the same should in equity or good conscience have been applied upon or

in payment of the account of said cross-complaint or that the earnings of any such property have been diverted or used in any manner whatsoever or particularly that they have been diverted for the payment of interest on the bonds secured by the mortgage sought to be foreclosed by this cross-complainant; or any of the other matters and things set forth in paragraph five of said cross-complaint, and that cross defendant therefore prays that said cross-complainant may be required to make strict proof of each and all of the allegations in paragraph five of said cross-complaint and particularly as to the matter of the earnings and income derived from any of the property of said Railway Company at any time and as to any diversion or misapplication thereof.

## V.

This answering cross-defendant denies that said cross-complainant is entitled to a prior or any lien or preference claim on the said Swan Falls Power Plant or upon any of the property, rights or franchises of the said Idaho Railway, Light and Power Company or on the income or earnings of such property and denies that the earnings of all or any of such property or the proceeds of all or any thereof in the event of a sale should first be applied to the payment of the amount claimed to be due said cross-complainant or should be so applied at all and denies that the cross-complainant should be held or decreed to have any lien or equitable or other mortgage upon any of the property of the said Railway Company.

Wherefore this cross-defendant, having fully ans-



wered the cross-bill of the said I. P. Morris Company, prays that the same be dismissed and that this cross-defendant have such other relief as may be just and agreeable to equity and have its costs in this behalf most wrongfully sustained.

GUARANTY TRUST COMPANY OF NEW  
YORK, TRUSTEE, WYMAN & WYMAN,  
Residence: Boise, Idaho,  
Its Solicitors.

FRANK T. WYMAN, Counsel.

Endorsed: Filed June 12, 1914.

A. L. Richardson, Clerk.

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(Title of Court and Cause.)

In Equity—No. 470, No. 468, Consolidated.

STIPULATION ON FACTS ON CROSS-BILL OF  
I. P. MORRIS COMPANY FOR PREFERENCE.

It is hereby stipulated by and between I. P. Morris Company, hereinafter styled Morris, and O. G. F. Markhus as Receiver of the Idaho Railway, Light & Power Company, hereinafter referred to as Railway Company, that the Receiver need not answer said cross-bill or claim for preference, and his rights shall not in any way be prejudiced by failure to so answer.

The allegations in the address to the court and paragraphs I, II and III of said cross-bill or claim for preference are admitted to be true and correct, save and except that the material mentioned in paragraph III thereof was received by the railway company prior to the first day of June, 1913, but the installa-



tion thereof was not finally completed or the work accepted until within six months of the appointment of said Markhus as Receiver. That attached hereto, marked Exhibit "A", and made a part of this stipulation, is a copy of the contract (without specifications) under which such material was furnished and labor performed by Morris.

That for the purpose of determining whether the claim of said Morris is a preferential claim, the following additional facts are admitted to be true by the parties to this stipulation, and further proof thereof is waived:

(a) That the items mentioned in the cross-bill or in the contract (Exhibit "A") as spare parts are still retained by said Morris and have not been delivered to the Railway Company or its Receiver. That the value and cost of said spare parts is \$5,138.00.

(b) That on the item of \$530.15 the Railway Company has and is entitled to a credit of \$179.10.

(c) That in the fall of 1912, and prior to October 31st of that year, the Railway Company, being the owner of the Swan Falls Power Plant, determined to improve, enlarge and in part rebuild the same by removing three 300 K. W. generating units and replacing the same by two 1250 K. W. generating units, with the necessary foundation, wheel pits, gates and tail races, all so arranged and placed that two additional 1250 K. W. can be installed in the future. That the Railway Company was at that time and ever since has been a public service corporation, engaged

in the generating, selling and delivering of electric current for heating, lighting and power purposes, and the enlargement and improvement made at the Swan Falls plant under the Morris contract was for the purpose of putting the Railway Company in a condition to better serve its customers and to supply the increasing demand for electric current for the purposes stated.

(d) That under the contract, hereto attached and referred to in the cross-bill, Morris manufactured and supplied the machinery therein described, and furnished the same to the Railway Company, making deliveries thereof in the spring of 1913, and prior to June 1st of that year, with the exception of the spare parts which, as heretofore stated, are still in the possession of Morris. That the work was carried on with such progress that the first enlarged unit was completely installed and placed in operation about the first of June, 1913, and the second enlarged unit was installed and placed in operation before June 20, 1913, and the remainder of the work was done during the summer of 1913 and was completed by Morris to the extent required under its contract in the latter part of September, 1913, and on December 9, 1913, the Railway Company formally accepted the machinery supplied and work done by Morris, and the payments alleged in the bill were then made; and no other payments on account of such contract or work have been made by the Railway Company or the Receiver, except as stated in the cross-bill or claim of preference of Morris.

(e) That there is due to Morris from the Railway Company the amount expressed in the two promissory notes mentioned in the cross-bill, to-wit, \$26,493.16, with interest at six per cent. (6%) from date, and the sum of \$351.05 on open account, all subject to whatever determination the court may make as to the liability of the Railway Company as to the spare parts not delivered, of the cost and value of \$5,138.00. And it is agreed that the notes were simply taken as evidence of indebtedness and not in payment, and that said notes have not been paid.

(f) That the Swan Falls Plant, from the time such enlargements and improvements were made, has been running continuously at its full capacity, except when shut down for necessary repairs or because of accidents, in order to supply the demand on the company and its Receiver for electric current.

(g) That the total rate reliable capacity of the Swan Falls plant is 4200 K. W., of which 2500 K. W. is generated by the machinery furnished by Morris; such power plant is the only plant owned and operated directly by the Railway Company, and its net earnings from its power business, in the proportion that 25 bears to 42, are attributal to the capacity generated by the machinery furnished by Morris. The Railway Company in addition to its power properties is owner of about seventy miles of electric railway line to which it furnishes power and from the operation of which it also receives passenger and freight receipts. The operation of the traction and power properties of the Railway Company from November



1, 1912, to January 1, 1914, produced the following net results:

<i>Month</i>	<i>Light and Power Net</i>	<i>Traction Net</i>	<i>Total Net from All Sources</i>
1912			
November . . . .	\$12,801.93	\$ 9,024.82	\$21,826.75
December . . . .	10,734.39	8,114.26	18,848.65
1913			
January . . . . .	11,034.44	7,608.94	18,643.38
February . . . .	8,931.80	7,828.75	16,760.55
March . . . . .	8,597.08	10,000.55	18,597.63
April . . . . .	6,730.10	9,383.25	16,113.35
May . . . . .	10,083.90	13,165.11	23,249.01
June . . . . .	10,228.13	12,467.41	22,695.54
July . . . . .	10,914.12	12,820.24	23,734.36
August . . . . .	10,326.11	10,612.11	20,938.22
September . . . .	13,975.68	16,799.98	30,775.66
October . . . . .	15,393.78	9,722.54	25,116.32
November . . . .	8,512.35	9,711.13	18,223.48
December . . . .	10,129.00	7,488.76	17,617.76

(h) That between November 1st, 1912, and December 23rd, 1913, the Railway Company paid from its earnings in interest on bonds of the Boise & Interurban Railway Company, one of its constituent traction properties, on April 1st, 1913, \$26,825.00 and on October 1st, 1913, \$26,825.00. That it paid as interest on the bonds of the Boise Railroad Company, Limited, another constituent traction property owned by the Railway Company, on December 1st, 1912, \$9,725.00, on June 1st, 1913, \$9,725.00, and on December 1st, 1913, \$9,725.00. And it paid for



the benefit of the sinking fund of the bonds issued by said Boise Railroad Company on December 1st, 1912, the sum of \$5,000.00, and on December 1st, 1913, the sum of \$5,000.00. That on December 1st, 1912, it paid as interest on the bonds of the Railway Company \$146,075.00. That on June 1st, 1913, it paid as interest on the bonds of the Railway Company, \$165,750.00.

(i) That in addition to the sums so paid out from its earnings for interest and for sinking funds, the Railway Company has paid out of its earnings large sums for permanent improvements and equipment, adding materially to the value of the property securing the bonds of the Railway Company issued under the trust deed or mortgage to the plaintiff, Guaranty Trust Company of New York.

(j) That on or about December 19, 1913, one E. H. Jennings attached bank deposits of the Railway Company to the amount of approximately \$18,000.00 for a debt of that company, which attachment still remains in full force.

(k) It is agreed that the machinery furnished to the Railway Company is worth the price thereof and that it has become a part of the corporate properties and assets of the Railway Company, and has added to the security of the plaintiff's mortgage by an amount equal to such cost and value, and that such machinery is necessary to the continued operation of the Railway Company's system, and that without it it could not perform its duties to the public; and that said material was furnished and work performed by

Morris for the Railway Company in the belief and intention that the same, unless otherwise provided for by the Railway Company, would be paid for out of the operating or current income thereof.

(l) That the operation of the traction and power properties of the Railway Company under the Receiver since the end of the year, 1913, has produced the following net results:

<i>Month</i>	<i>Light and Power</i>	<i>Traction</i>
1914	<i>Net</i>	<i>Net</i>
January . . . . .	\$ 4,976.98	\$8,142.31
February . . . . .	5,027.66	5,597.69
March . . . . .	6,025.07	8,185.59
April . . . . .	10,750.32	8,555.18
May . . . . .	14,294.08	*8,500.00

\* Estimated.

(m) That the earnings of the Railway Company from sources other than its traction and power properties, between November 1st, 1912, and April 30th, 1914, aggregate \$6,037.59.

(n) That for the purpose of a decision on the preference claimed by Morris, it is admitted that the Railway Company's properties will not sell for the sum of its first mortgage indebtedness.

Dated June 16, 1914.

RICHARDS & HAGA,  
McKEEN F. MORROW,

Solicitors for Defendant, I. P. Morris, Company.

CAVANAH, BLAKE & McLANE,  
Solicitors for O. G. F. Markhus, Receiver of  
Idaho Railway, Light & Power Company.

*EXHIBIT "A."*Contract between  
IDAHO RAILWAY, LIGHT & POWER  
COMPANY,

and

I. P. MORRIS, COMPANY,  
with specifications covering  
2 1750 H. P. Main Units  
and

1 300 H. P. Exciter Unit

with complete governing mechanisms.

*This Agreement*, made this thirty-first day of October, Nineteen hundred and twelve, by and between Idaho Railway Light and Power Company, a corporation organized and existing under the laws of the State of . . . . ., hereinafter called the Purchaser, party of the first part: and The I. P. Morris Company, a corporation organized and existing under the laws of the State of Pennsylvania, hereinafter called the Contractor; party of the second part;

*Witnesseth*: That for and in consideration of the payments hereinafter expressed being made to the Contractor by the Purchaser at the times and in the manner hereinafter set forth, the Contractor agrees to design, construct and deliver to the Purchaser, free on board cars at Murphy, Idaho, the following machinery, to-wit:

Two (2) 1750 horse-power turbine water wheels  
to be installed at Swan Falls, Idaho;

One (1) 350 horse-power exciter turbine;

Two (2) I. P. Morris governors, with central  
pumping plant, for main units;

One (1) Lombard governor for the exciter turbine;

One (1) set of spare parts for main units;

One (1) set of spare parts for main unit governors;

One (1) set of spare parts for exciter unit;

all as more specifically described and enumerated in the specifications hereto attached, and which are hereby made a part of this contract; the terms of such specifications to be read into this contract as though each of its provisions were enumerated herein.

#### *Terms Used.*

In this contract the word "Work" or "Works" shall, unless the context require a different meaning, mean the whole of the work and the materials, matters and things required to be done, furnished and performed by the Contractor under this contract, in order to complete the construction of the items enumerated herein.

The word "Engineers" shall mean the Engineers of the Purchaser Viele, Blackwell & Buck, 49 Wall Street, New York City, who have control over the work on behalf of the Purchaser; or, as the case may be, any person especially authorized by them to perform any of the functions or exercise any of the powers hereby allotted to or conferred upon them as such Engineers.

#### *Successors and Assigns.*

All covenants and agreements herein contained shall be binding on and extend to the successors of the Contractor and Purchaser respectively.



*Labor Machinery.*

The contractor will, at his own expense, provide all and every kind of labor, machinery and other plant, materials, articles, transportation and things whatsoever necessary for the due execution and completion of all the work set out or referred to herein, or in the specifications hereunto annexed and forming a part of this contract.

*Quality of Work.*

All of the work is to be constructed of the best material of their several kinds and finished in the best and most workmanlike manner, as required by, and in strict conformity with the said specifications and with the plans and profile or drawings prepared and to be prepared, as herein provided, to the complete satisfaction of the Engineers, and should any discrepancy arise as to the meaning intended by the specifications, plans and drawings above referred to, or as to the meaning of any part of this contract, the decision of the Engineers thereon shall be final and binding.

*Delivery.*

It is further understood that time is of the essence of this Agreement and that work on all of the material, machinery, plant, articles and things to be furnished as herein specified, shall be commenced at once, and the Contractor agrees (strikes, fires and acts of God only excepted) to make shipments from the Contractor's shops of the various items as follows:

Speed ring foundation bolts and exciter draft tube, January 1st, 1913;

First main unit and exciter unit speed ring, February 15, 1913;

Second main unit speed ring, March 1st, 1913;

Remainder of first main unit and exciter unit; also first governor, central pumping system and exciter governor, March 15, 1913;

Remainder of second main unit and second governor, April 1st, 1913.

It is also understood that the spare parts included in this contract will be delivered within one (1) year from date; or within three months from notice to proceed with the construction of the spare parts, provided such notice is not given prior to April 1, 1913.

*Contractor's Liability for Delay in Delivery.*

It is understood and agreed that for each and every day after April 1, 1913, by which the contractor fails to deliver at Contractor's works all of the above apparatus, excluding only the spare parts, the Purchaser shall deduct from the price to be paid, as liquidated damages, the sum of Fifty Dollars (\$50.00) for each day of such delay.

PERFORMANCE GUARANTEES:

*Main Turbines (Power).*

Each main turbine wheel is guaranteed to deliver to the generator shaft seventeen hundred and fifty (1750) horse-power when operating under a head of twenty-one (21) feet and running at a speed of ninety (90) revolutions per minute.

Contractor's Performance Curve Sheet No. 159, attached hereto, shows the expected performance of the main turbines for heads of sixteen (16) feet, nineteen (19) feet, twenty-one (21) feet and twenty-two (22) feet.

*Efficiency.*

Contractor guarantees that each main turbine unit, when operating under a head of twenty-one (21) feet and at a speed of ninety (90) revolutions per minute, will have an efficiency of at least:

85% at 1750 horse-power;

81% at 1530 horse-power;

78% at 1310 horse-power; and

68% at 875 horse-power.

*Exciter Turbines.*

The exciter turbine wheel is guaranteed to deliver to the generator shaft, three hundred and fifty (350) horse-power when operating under a head of twenty-one (21) feet and running at a speed of one hundred and ninety (190) revolutions per minute.

Contractor's performance curve sheet No. 160, attached hereto, shows the expected performance of the exciter turbine for heads of sixteen (16) feet, nineteen (19) feet, twenty-one (21) feet and twenty-two (22) feet.

*Efficiency.*

Contractor guarantees that the exciter turbine, when operating under a head of twenty-one (21) feet at a speed of one hundred and ninety (190) revolutions per minute, will have an efficiency of at least:

84% at 350 horse-power; and  
77% at 260 horse-power.

*Rejection of Runners of Main Units.*

If the wheels fail to show a maximum efficiency of at least eighty-three (83%) per cent., or fail to deliver seventeen hundred and fifty (1750) horse-power when operating under a head of twenty-one (21) feet and running at ninety (90) revolutions per minute, the runners shall be subject to rejection at the option of the Purchaser.

In the event of rejection, the Contractor agrees to replace the runners at his own expense, to increase the efficiency or power. All costs for additional tests after the first test shall be borne by the Contractor.

*Runner Models.*

The Contractor guarantees that each main and exciter turbine runner will be an exact reproduction, on an enlarged scale, of Contractor's experimental runner known by the symbol "O" test report of which is attached hereto and signed by the Hydraulic Engineer of the Holyoke Water Power Company.

The runners for these turbines will be geometrical-ly similar to the test runner "O" described above, the drawings being stepped up by pantograph from the test runner to the sizes required for the respective power of the units.

*Design of Draft Tubes.*

All the foregoing performance guarantees are made with the understanding that the draft tubes for the main units will be constructed by the Pur-



chaser from designs submitted by Contractor and approved by the Engineers.

*Operation.*

The contractor guarantees all of the work under this agreement against defects due to design, workmanship, or materials, for a period of one year after it has been started into commercial operation. It is understood that the Contractor will not be held responsible for injuries to the machinery caused by foreign substances contained in the water supplied to the turbines, by improper handling by the Purchaser or from the failure of the foundations prepared by the Purchaser.

*Approval of Contractor's Drawings.*

It is also mutually understood and agreed that all of Contractor's drawings applying to this work are to be submitted to the Engineers of their duly authorized representative for approval and acceptance in writing before the work is put into the Contractor's shops; the approval of the drawings, however, shall not relieve the Contractor from any of his obligations under this agreement, nor from the responsibility for any clerical errors in the drawings.

*Inspection.*

The Contractor shall at all times permit the Engineers or their duly authorized agent, to freely examine all its plans for said work, and shall permit free access to all parts of its shops where any material which shall be intended to be used in the building of the apparatus covered by this Agreement is

to be made, together with full facilities for inspecting and testing any of the said material.

Inspectors, appointed by the Engineers, shall be given every facility for the examination of all parts of the work at all stages of its progress, whether at the works of the contractor or of parties furnishing material of any kind to be used on this work, or doing any of the work herein specified. They shall be fully advised by the Contractor concerning the progress of the work both in the shops and at outside establishments, and informed as to times and places where tests are to be conducted. All necessary movements of parts to facilitate measurements and examination shall be made by Contractor for them, and every assistance given them for fully accomplishing this.

Any workmen or employes of the Contractor who shall wilfully violate any of the requirements of this contract or act in a disorderly manner, or refuse to comply with reasonable requests to carry out the work in a satisfactory manner, or who shall be considered incompetent, shall upon proper representation of inspectors, be dismissed from the work and not at any future time be employed thereon.

#### *Changes to Apparatus.*

It is also agreed that any changes in or additions to the apparatus and parts thereof included in this contract and the accompanying specifications, which may be agreed upon between the Engineers and the Contractor during the progress of said work shall become effective and accepted by the contractor and

paid for by the Purchaser at a price to be previously agreed upon in writing by and between the Contractor and the Engineers; provided, however, that in case and whenever such changes or additions involve the abandonment of work commenced or in process of completion, the Purchaser shall adequately reimburse the Contractor for all losses or labor and material and for any expense incurred in making changes. If changes involve in increase of cost in the work the increase will be borne by the Purchaser; if a decrease, it will be borne by the Contractor.

*Extension of Time.*

It is expressly agreed that the time herein specified within which the said work shall be done shall not be increased by reason of such changes or additions, nor shall any claim be made by the Contractor for any allowance in time by reason of any such changes or additions, or by reason of any other act of the Purchaser, unless the allowance in time shall have been claimed by the Contractor in writing immediately upon receipt of any order for a change from the Engineers, or immediately after the doing of any other act by the Purchaser by reason of which an allowance in time will be claimed, and the amount of any such allowance in time shall have been agreed upon in writing between the parties hereto.

*Expense of Unloading from Cars and Erection.*

It is further understood and agreed that the Contractor under the terms of this Agreement is not to bear the expense at the power house of unloading



from cars, transporting from cars to power house, or placing, assembling, erecting, or adjusting any of the aforesaid work, machinery or parts thereof, but the Contractor does hereby agree to furnish an erecting superintendent for the rate of ten dollars (\$10.00) per day, plus all traveling and living expenses from the date of his leaving Contractor's work until his return thereto. The erecting superintendent shall be at the Purchaser's power house on the arrival of the first main unit, and shall remain there and superintend and direct the men who shall be furnished by the Purchaser to unload from the cars, erect upon the foundations to be provided by the Purchaser, and adjust all of the work to be furnished by the Contractor, to the end that the machinery may be erected in accordance with the Contractor's drawings, and to the end that the machinery may be adjusted to the requirements of the Contractor in order to meet the guarantees of capacity, efficiency and performance called for under this contract. It is further understood and agreed that the erecting superintendent furnished by the Contractor as aforesaid is to be under the general direction of the Engineers. It is also understood and agreed that Purchaser shall furnish all necessary skilled and unskilled labor, tools, rigging including the use of the power house cranes, and appliances for the safe and efficient handling and erecting of the work, under the personal supervision of the erecting superintendent of the Contractors.



*Responsibility for Damages.*

It is understood and agreed that the Purchaser is to be responsible for all damages to machinery during the unloading and erection of the work under this Agreement, but that the Contractor will be responsible for the satisfactory quality of the work of erecting, assembly, and adjustment of machinery under this Agreement carried out under supervision of or pursuant to directions of the erecting superintendent aforesaid.

*Tests.*

As soon as any water wheel unit to be furnished by Contractor shall have been placed in successful operation, it will be tested by and at the expense of the Purchaser, in order to determine whether it meet with the conditions and stipulations of this contract. The efficiencies, outputs and heads of the turbines will be determined in accordance with the specifications.

The generator efficiencies and losses will be taken from tests made at the works of the builders of the electrical apparatus, or from tests made on the generators after installation.

The Contractor reserves the right to have a representative present at all tests of the turbines, the generators and calibration tests on instruments.

*Governor Guarantees.*

The Contractor guarantees that the governors will meet the requirements of speed regulation as stated in the accompanying specifications.

*Arbitration.*

To make all tests, an Engineer shall be appointed by the Purchaser and an Engineer shall be appointed by the Contractor. These two shall select a third Engineer, in the event of their being unable to agree of themselves. In case of disagreement as to the selection of the third Engineer, he shall be appointed by the President of the American Society of Civil Engineers. The decision of any two of the Engineers shall be considered final by the party whose contentions are not sustained.

*Contractor's Liability for Extra Work.*

It is agreed by Contractor that in case it shall be found upon commencement of operation, or at any time after the work shall have been erected, that any part thereof does not in any particular comply with the terms of this Agreement, that in every such case it may and will do any work necessary to make the work furnished hereunder comply in all respects with the terms of this agreement and the said specifications and drawings, at such times and by such methods as will least interfere with the completion and operation of the power plant of the purchaser, and that it will do any and all such work at its own cost and expenses; and in doing such work will save harmless the Purchaser from any cause, or damage to its property or to any of its employees, or to any other person or thing, arising from work carried on by the Contractor on the premises of the Purchaser; it being distinctly understood that nothing herein contained shall prevent the Purchaser from commencing

the use of the said work as soon as it has been erected and is ready for commercial operation and to continue the use of the same in the course of its business, whether the turbines shall in all respects comply with this Agreement and specifications attached hereto, and are entirely acceptable to the Engineers, or not.

*Patents.*

In order to insure the Purchaser against any possible loss or expense by reason of adverse claims under patents, based upon the use of any of the apparatus or parts thereof covered by this Agreement, the Contractor guarantees that the Purchaser shall not be disturbed in the use of said apparatus and parts thereof by litigation based upon such adverse claim, and to that end the Contractor will at his own expense defend any and all suits or proceedings that may be instituted against the Purchaser for the infringement, or alleged infringement, of any patent or patents, by the use of any of said apparatus or parts thereof, provided such infringement shall consist in the use by the Purchaser in the regular course of its business of said apparatus or parts thereof, and provided the Purchaser gives to the Contractor immediate notice in writing of the institution of suit or proceedings, and permit the Contractor, through its Counsel, to defend the same, and give all needed information, assistance and authority to enable the Contractor so to do; and thereupon, in case of an award of damages, the Contractor will pay such award, and in the case of an injunction against the

Purchaser, the Contractor will pay the Purchaser any loss or damages to his business caused by such injunction.

*Payments.*

For the performance of this Agreement by the Contractor, the Purchaser agrees to pay to the Contractor, the sum of Forty four thousand, five hundred dollars (\$44,500.00), lawful money of the United States.

Payments by the Purchaser on account of work under this Agreement shall be made as follows:

25% of the value of each shipment on delivery at Contractors Works;

25% of the value of each shipment upon its arrival at destination;

25% of the value of each main unit with its auxiliaries, and of the exciter unit with its auxiliaries after test has been made and units have been found to meet the quarantees; such test to be made within sixty (60) days after the units are put into commercial operation;

25% of the total contract price, which is the final payment, to be made within one hundred and twenty (120) days after the receipt of the apparatus at destination.

If, through no fault of the Contractor, test of the apparatus is delayed beyond the sixty-day period mentioned above, the third payment shall be made just as though the tests had been made; such payment, however, is not to relieve the Contractor from his responsibilities as set forth in this Agreement.



For convenience in making payments, the value of each item of machinery included under this contract shall be taken as follows:

Each main unit.....	\$10,791.50
The exciter unit.....	6,255.00
Each governor for main units.....	5,375.00
Spare parts for main unit governors	175.00
The exciter governor.....	774.00
Spare parts for main units.....	4,000.00
Spare parts for exciter unit.....	963.00

#### *Optional Wheel.*

Contractor agrees to give Purchaser under this Agreement an option for a period of one (1) year from date hereof, on

Two (2) Main units, to be exact duplicates of those described hereunder, delivered f. o. b. Murphy, Idaho, for a price of Twenty One Thousand Five Hundred and Eighty-three Dollars (\$21,583.00), and

Two (2) I. P. Morris governor mechanisms for these units, with complete connections to the central pumping system, for a price of Ten Thousand Seven Hundred and Fifty Dollars (\$10,750.00).

It is understood and agreed that the apparatus to be ordered under the above option will conform to the attached specifications.

Contractor agrees that the first of these optional wheels, with its governor, will be delivered f. o. b. cars the Contractor's works within four (4) months from the date notice is received to proceed; such de-

livery, however, not to be made earlier than June 1st, 1913.

The second wheel under this option, with its governor, will be delivered two (2) months after the delivery of the first additional wheel.

It is agreed that the terms of payment outlined herein for the main and exciter units, with auxiliaries, will also apply to the wheels under this option.

*In Witness Whereof*, the parties hereto have caused these presents to be executed in duplicate by their respective officers, duly authorized thereto, the day and year first above written.

I. P. MORRIS COMPANY,  
(Signed) H. W. HAND,

Attest: Vice-President.

(Signed) CHAS. T. TAYLOR, Secretary.

IDAHO RAILWAY, LIGHT & POWER  
COMPANY,

(Signed) SAMUEL L. FULLER,

Attest: Vice-President.

(Signed) G. E. HENDEE, Secretary.

Endorsed: Filed June 19, 1914. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

STIPULATION AS TO ANSWERS AND PROOF  
ON PREFERENTIAL PETITIONS.

It is hereby stipulated by and between all the parties hereto and their counsel that the parties hereto, other than the plaintiff, need not answer cross-bills or intervening petitions claiming preferences in the

distribution of the assets of the receivership estate, nor need the interveners answer the bill or cross-bills in the original consolidated causes, or either of them, and that the issues on the various intervening petitions and cross-bills claiming preferences shall be deemed made up by the said petitions or cross-bills and the answers of the plaintiff, Guaranty Trust Company of New York, thereto.

It is further stipulated that all stipulations of fact on intervening petitions or cross-bills entered into by the receiver and the respective interveners or cross plaintiffs shall be deemed to be evidence not only as against or in favor of the parties to the stipulation, but also as against or in favor of the remaining intervening claimants, it being conceded that the assets of the estate will be sufficient to pay all claims obtaining preferential rights, so that the allowance of one claim will not prejudice the rights of all the claimants as against each other.

Dated, June 10, 1914.

CAVANAUGH, BLAKE & McLANE,  
Solicitors for Receiver.

WYMAN & WYMAN,  
Solicitors for plaintiff, Guaranty Trust Co. of  
New York.

ALFRED A. FRASER,  
Solicitor for Idaho Railway and Idaho Traction  
Companies.

PERKY & CROW,  
Solicitors for Westinghouse Electric & Manu-  
facturing Co.

RICHARDS & HAGA,

Solicitors for E. H. Jennings, I. P. Morris Company and John A. Roebling's Sons Company.

FREMONT WOOD, DEAN DRISCOLL,

Solicitors for American Steel Wire Company.

HAWLEY, PUCKETT & HAWLEY,

Solicitors for General Electric Company.

Endorsed: Filed June 15, 1914. A. L. Richardson,  
Clerk.

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(Title of Court and Cause.)

STIPULATION.

Bills in intervention claiming preference in distribution and prior rights to parts of the properties claimed to be covered by the mortgage to the Guaranty Trust Company sought to be foreclosed herein, having been filed in the above consolidated causes, testimony taken, and the same submitted to the Court for its decision, and all parties hereto being desirous to have decisions on such preference rights and other claims of priority adjudicated at this time in advance of the entry of decree of foreclosure or such other decree as may be entered, so as to expedite the final settlement of the receivership estate, and to permit the speedy disposition of appeals if any should be taken from the decree upon such bills in intervention;

*It is hereby stipulated*, between all parties to said actions and all intervening claimants to preference or priority, that final decree upon all such claims of preference and to priority may be entered by the



Court at this time, with the same effect as if entered either upon or after decree of foreclosure or distribution, or such other final decree as the Court may enter upon the rights of the mortgagee. That this stipulation and the entry of such decree shall be without prejudice to the right of the said Guaranty Trust Company of New York, to take such further proceedings by way of filing supplemental, amended or new bill of foreclosure, or otherwise as it may be advised, but the said decree so entered at this time shall be final and binding (subject to any determination that may be made upon appeal as to the merits thereof) in any such proceedings so taken, and any proceedings so taken by the Guaranty Trust Company shall be without prejudice to the rights of such intervening claimants as established by the decree to be now entered, which said decree shall bind the rights of all parties hereto, as to the matters therein stipulated in any proceeding so taken.

Any such decree adjudicating such claims for preference and prior rights shall be deemed and taken as a final decree so as to permit appeal or appeals, if any be desired, to be taken, without awaiting or depending upon the decree of foreclosure of the mortgage of the Guaranty Trust Company.

WYMAN & WYMAN,

Solicitors for Guaranty Trust Company of New  
York.

ALFRED A. FRASER,

Solicitor for Idaho Railway, Light & Power  
Company.

ALFRED A. FRASER,  
Solicitor for Idaho Traction Company.

PERKY & CROW,  
Solicitors for the Westinghouse Electric & Manufacturing Company.

RICHARDS & HAGA,  
Solicitors for E. H. Jennings, I. P. Morris Company and John A. Roebling's Sons Company.

HAWLEY, PUCKETT & HAWLEY,  
Solicitors for General Electric Company.

WOOD & DRISCOLL,  
Solicitors for American Steel & Wire Company.

October 10, 1914.

Endorsed: Filed Oct. 10, 1914.

A. L. Richardson, Clerk.

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(Title of Court and Cause.)

In Equity—No. 468.

STIPULATION AS TO RECORD ON APPEAL.

The following stipulation shall apply both to the appeal of John A. Roebling's Sons Company of California, a corporation, and to I. P. Morris Company, a corporation. It is also stipulated that all other preferential claimants or parties seeking priority of right in respect to the payment of claims referred to in the final decree in the above entitled cause have refused to join in any appeal therefrom and that the appeal of said John A. Roebling's Sons Company of California and of said I. P. Morris Company from said decree may be allowed by said Court.

For the purpose of condensing the record on appeal

of John A. Roebling's Sons Company of California, a corporation, and the appeal of I. P. Morris Company, a corporation, from the final decree made and entered on the 20th day of December, 1915, in the above entitled cause, it is stipulated as follows:

The original bill was filed herein by Westinghouse Electric & Manufacturing Company against Idaho Railway, Light & Power Company (hereinafter called "Railway Company"), on December 23, 1913, and was docketed as Number 468. The bill, in general form, was a creditor's bill, and prayed for the appointment of a receiver and the administration of the estate of the Railway Company, as an insolvent corporation. Subpoena was issued and the Railway Company answered, generally confessing the allegations of the bill, and consenting to the appointment of the receiver, on the same day, and thereupon the Court appointed O. G. F. Markhus as receiver, and he at once qualified by filing the required oath and bond. The bill, answer and order appointing the receiver will be included within the transcript as part of the record.

On the 14th day of January, 1914, pursuant to leave of Court, Guaranty Trust Company of New York, as trustee under a mortgage executed by the Railway Company to secure an issue of first and refunding sinking gold bonds, filed a bill against the Railway Company and other defendants for the foreclosure of said mortgage, on account of alleged defaults by the Railway Company in the performance of various covenants and conditions of the mortgage.

The property generally described in the bill of the Westinghouse Electric & Manufacturing Company was particularly described in the bill of the Guaranty Trust Company as the property subject to said mortgage. This bill was docketed as Number 470, and the proceedings thereon will be hereinafter referred to as "Cause No. 470."

Said bill for the foreclosure of said mortgage set forth in detail facts showing the corporate capacity of the parties thereto, the jurisdiction of the Court, the execution of the mortgage to secure the payment of \$9,095,000.00 of said bonds, the terms and conditions of said mortgage, the breach of covenants, and a detailed description of the property subject to said mortgage, which said description was grouped generally under the following classifications:

I. *Hydro Electric Power Plant at Swan Falls with Properties and Rights Appurtenant Thereto.*

Including:

- A. Various enumerated water rights, specified water rights, and
- B. 620 acres of land, more or less.
- C. Power plant at Swan Falls, Idaho.
- D. Two certain transmission lines of electric current known as "Dewey Transmission Line" and various branches thereof, and the Nampa and Boise Transmission Line.
- E. Rights of way, licenses, franchises, easements, etc.
- F. Certain additional real estate.
- G. Electrical equipment.



H. Miscellaneous properties, consisting of ferry boat at Swan Falls Ferry and all miscellaneous properties appurtenant to the properties described in Division No. I.

II. *Properties Formerly Belonging to Boise Valley Railway Co., Limited.*

Including:

- A. Railway lines in Boise City and suburbs.
- B. Rolling stock.
- C. Franchises granted by various cities, villages and counties of Idaho.
- D. Various parcels of real estate in and about the City of Boise.

III. *Properties formerly of Boise and Interurban Railway Company, Limited.*

Including:

- A. Various railway and transmission lines in and about the City of Boise.
- B. Rights, privileges and franchises granted by various described ordinances of the City of Boise, the City of Caldwell, and by the County Commissioners of Canyon County and Ada County of Idaho, and various contracts and leases described in said division.
- C. Twenty-three lots or parcels of real estate situated in Canyon and Ada Counties, Idaho, specifically described.

IV. *Properties Formerly of Dewey Electric Light and Power Company, Limited.*

Including:

Electric light plant at Nampa, Idaho, with its machinery, poles, wires, meters, electrical apparatus and equipment, and all franchises granted by certain ordinances of said City of Nampa.

V. *Nampa-Caldwell Extension.*

Including:

Railway between the Towns of Nampa and Caldwell, Idaho, with franchises, equipments and appurtenances thereunto appertaining.

VI. *Properties Formerly of Caldwell Power Company, Limited, and Connected Therewith.*

Including:

A Electric light and power plant, transmission lines at Caldwell, Idaho, with lands, buildings, machinery, rights and privileges appurtenant thereto.

B. Franchises granted by the City of Caldwell.

VII. *Miscellaneous Properties.*

Including:

Certain lands in the City of Nampa, with buildings, depot, terminal office, sub-station thereon and electrical apparatus therein, and distributing systems at the village of Murphy and at Silver City in Owyhee County, Idaho.

VIII. *Idaho-Oregon Light and Power Company Stock and Bonds.*

Including:

Various stocks and bonds of said Company.

IX. *Properties Formerly of the Boise Railroad Company, Ltd.*

Comprising:

A line of standard gauge street railroad in Boise City and its suburbs, together with rolling stock, franchises, and certain parcels of land described as the Natatorium Property and the Yates Park Property.

X. *Gem District Transmission Line.*

Consisting:

Of high tension transmission line, rights of way, poles, wires and electrical equipment, extending from Swan Falls Power House to Gem Irrigation District in Idaho, together with the Guffey branch thereof.

XI. *Stock and Bonds of Subsidiary Company.*

Including:

- A. Certain capital stock and bonds of Owyhee Irrigation Power Company.
- B. All the issued capital stock of Idaho Power and Light Company.
- C. The capital stock of Idaho Traction Company.
- D. Capital Stock of Boise Railroad Company, Ltd.
- E. Capital stock of Boise and Interurban Railway Company, Limited.

XII. *Miscellaneous Portable Personal Property.*

XIII. *Apparatus in Idaho-Oregon Substations Owned by Power Company.*

Located in Baker County, Oregon, and Boise City.

XIV. *Idaho-Oregon Equipment Trust Property.*

Consisting:

Of various extension lines of Idaho-Oregon Light and Power Company, in Canyon and Washington Counties, Idaho, and Malheur and Baker Counties, Oregon.

XV. *All Properties and Franchises not Specifically Described.*

Together with all after acquired property, and all incomes and profits of all of said property.

It was further alleged in said bill of complaint of said Guaranty Trust Company of New York, Trustee, in said Cause No. 470, and also in the bill of complaint of the same plaintiff in cause No. 517, hereinafter referred to, as follows:

“ That all of said property hereinbefore described, (save and except such stocks, bonds, securities, contracts, or choses in action as are pledged with your orator under said mortgage, and in its possession as pledgee and which it offers, to surrender unto this Court, or to its Receiver, for delivery to any purchaser at any sale held hereunder) is located and situated in the Counties of Ada, Owyhee and Canyon, in the State of Idaho, and in the Southern Division of the District of Idaho, and subject to the jurisdiction of this Court; *that said properties, real and personal, constitute a single, indivisible Hydro-electric power system, including stations, substations, transmission and distribution lines,*



“and a single, indivisible electric street and inter-  
 “urban railway system, with properties appur-  
 “tenant to, and used in connection with, said pow-  
 “er and railway properties.”

Upon, to-wit, January 19th, 1914, upon applica-  
 tion of the Guaranty Trust Company of New York  
 and upon consent of all defendants who had there-  
 tofore appeared in Cause No. 470 or in Number 468,  
 (being the suit filed by Westinghouse Electric & Man-  
 ufacturing Company, and which may be hereinafter  
 referred to as “Number 468” or the “Administration  
 Suit”), the Court entered an order providing for the  
 consolidation of Causes 468 and 470 “for purposes  
 of hearing and of said receivership, and the adminis-  
 tration of the receivership estate and that both said  
 causes proceed under the title of this cause, (Number  
 470), and all orders made and filed or entered herein,  
 whenever and so far as applicable, shall be deemed as  
 made in Cause Number 468 without being separately  
 filed or entered therein,” and it was further ordered,  
 “that the said receivership of said O. G. F. Markhus  
 now existing in Cause Number 468, \* \* \* be extend-  
 ed to and over this cause, and that said O. G. F. Mark-  
 hus shall be, and is hereby made, receiver in this  
 cause, and that said order of December 23rd, 1913,  
 entered in said Cause Number 468, wherein and  
 whereby said O. G. F. Markhus was appointed re-  
 ceiver in said cause, be entered as the order of the  
 Court in this cause, as of this date, and that said O.  
 G. F. Markhus shall hold and act as receiver in this  
 cause without further order of this Court.”

During the pendency of Cause Number 470 and until final dismissal thereof, as will hereinafter be stated, the causes proceeded under the caption of "Cause Number 470", the various papers filed being generally further entitled, "Number 468 Consolidated", and various administration orders were from time to time entered by the Court, which, except as herein referred to, are not material to this record. The proceedings taken during the pendency of Cause Number 470 may be referred to herein as taken in "the Consolidated Causes".

By the order appointing the receiver it was provided, among other things, that the receiver was authorized "subject to approval by the Court, to pay and discharge all claims arising from the previous operation of said (Railway) Company, as in his judgment on examination are proper to be paid as expenses of operation, and the current and unpaid pay-rolls and vouchers, and supply accounts, incurred in the operation of said property at any time within six months prior thereto." Pursuant to this authorization, on the 29th of January, 1914, the receiver filed, in the Consolidated Causes, a report and petition, reciting and listing the operating, pay-roll, and supply accounts, accrued within six months prior to his appointment as receiver, as known to him, and further stating that there were other claims, secured and unsecured, which might be entitled to priority or to special legal or equitable claims against the receivership estate, or its earnings, or entitled to preferential payment under the six months' rule made by the

Court, and listing said claims, so far as known to him. The petition prayed for authorization to pay the claims approved by the receiver after notice to the parties and opportunity for objection by any party in interest, and that all other creditors, whose claims were not so allowed, be required to present their claims to the receiver for allowance within the time fixed by the Court, and upon such notice as the Court might order. This petition was granted by an order entered upon the same date, allowing and approving for payment the claims approved by the receiver, payment however, not to be made until further order of the Court after notice to the parties, and further ordering that all other creditors having claims for preference under the six months' rule, be required to present their claims to the receiver for allowances within ninety days from the date of the order, and that other creditors be required to intervene in the cause within a like time. Notice of the order was required to be mailed to all creditors known to the receiver, and to be published for four weeks in newspapers published in Boise, Idaho, Chicago, Illinois, and New York, New York. No question is raised on the form of this order or the notice given pursuant thereto, and it is stipulated that such notices were duly and regularly mailed and published as required by the terms of the order, and that due proof of the giving of such notice was filed by the receiver.

Pursuant to further notices regularly given, the hearing on the preference claims came on, on June 15th, 1914, and the Court then entered an order al-

lowing certain of said preference claims, and directing their payment, and dis-allowing others. Said order is not here material, as the claims passed upon by the Court did not include any of the claims involved in this record.

In the meantime, and within the time allowed by the Court for creditors to present their claims, the following named creditors, by cross-bill, or petition in intervention in the nature of cross-bill, filed with the Clerk in the Consolidated Causes, pursuant to leave of Court regularly obtained, claims to priority or preference in distribution either of the income of the receiver or proceeds of sale, as follows:

John A. Roebling's Sons Company of California .....	\$21,057.37
American Steel & Wire Company.....	1,180.05
I. P. Morris Company.....	26,844.21
General Electric Company.....	2,475.92
Westinghouse Electric & Manufacturing Company .....	15,246.99

The petitions, answers, stipulations of fact and other stipulations and testimony on such of these claims as are involved in this appeal, will be included in full in the transcript of record, and will not be abstracted here.

These claims came on for hearing on the records as set out in the transcript of record on and after June 21st, 1914, and were taken under advisement by the Court.

After the submission of these claims and during the month of July, 1914, upon the hearing of certain



motions directed to the pleadings in Cause No. 470, the Court, by memorandum decision, intimated that the foreclosure bill in said Cause Number 470 had been prematurely filed, because the period of grace allowed by the mortgage after default had not expired at the time the bill was filed, and that a hearing might result in judgment of dismissal. Some doubt being expressed as to the effect which such a dismissal would have upon the intervening claims, and with a view to facilitating the administration of the estate, and to save the labor which had been expended in preparing and presenting the intervening claims to the Court for decision, the parties on, to-wit, October 6th, 1914, entered into a stipulation in the Consolidated Causes that any dismissal of Cause Number 470, should be without prejudice to the intervening claims presented by cross-bill or petition in intervention to the Court, and that such claims might be determined by the Court, after dismissal of Cause Number 470, either in Cause No. 468, or in any new suit to foreclose the mortgage of the Guaranty Trust Company of New York which might be brought by said Company. Thereafter, pursuant to such stipulation, and on December 17th, 1914, an order was entered in the Consolidated Causes dismissing Cause Number 470, and specifically providing as follows: "That said Cause Number 470, and the said amended bill filed herein, be, and the same are hereby dismissed without prejudice, Plaintiff to pay costs," further ordering, plaintiff consenting thereto, "That claims to preference heretofore made by intervention

or otherwise, and all proceedings had thereunder shall not be prejudiced by such dismissal, and if the Court shall hereafter consider such course necessary, such claims shall be deemed as filed in any new suit filed by said plaintiff, Guaranty Trust Company of New York." And said order further provided, "That either party hereto may apply to the Court for any directions to the receiver herein, arising out of the commencement, pendency and dismissal of said Cause Number 470." Immediately following the last mentioned order, and, to-wit, on December 17th, 1914, the said Guaranty Trust Company of New York, pursuant to leave of Court, filed a new bill of foreclosure, which said bill was docketed as Number 517, and made the Railway Company and its receiver and others not here necessary to be named, parties defendants. The bill was in substantially the same form as that which was dismissed, and covered the same property, but, in addition to the defaults stated in the bill in Cause Number 470, alleged other defaults subsequently accruing, and the running of the period of grace prescribed by the mortgage.

This Cause Number 517 was never consolidated with the administration suit Number 468, but the two proceeded independently, and on, to-wit, April 19th, 1915, a decree of foreclosure and sale was regularly entered in Cause Number 517.

By this decree of foreclosure it was provided, among other things, particularly in Paragraph Eight thereof, as follows:

That the lien of the plaintiff herein adjudged, and any sale made under this decree to satisfy

said lien, or the proceeds of any such sale, as hereinafter provided, are subject:

1st. To the expenses of the sale and of the proceedings in this cause.

And inasmuch as it is alleged in the bill of complaint herein and appears that there was commenced in this Court on December 23rd, 1913, a suit wherein Westinghouse Electric & Manufacturing Company, a Pennsylvania corporation, was plaintiff and Idaho Railway, Light & Power Company, was defendant, by the bill in which said suit it was alleged, among other things, that the said defendant, Idaho Railway, Light & Power Company was indebted to the plaintiff, and to other creditors, and the appointment of a Receiver and the administration of the estate of said Idaho Railway, Light & Power Company, as an insolvent corporation on behalf of the plaintiff and other creditors, were prayed for, which said allegations were confessed by said defendant, and O. G. F. Markhus, one of the defendants herein, was appointed Receiver of said Idaho Railway, Light & Power Company, which said suit is now pending undetermined in this Court, and the properties of said defendant, Idaho Railway, Light & Power Company are in the possession of this Court, through said Receiver, who has been and is administering the same since said date, under the orders and directions of the Court;

And it further appearing to the Court that various bills in intervention and suits claiming

preference in the distribution of the proceeds of any sale of the properties of the defendant, Idaho Railway, Light & Power Company, and claiming prior title and rights to parts of the mortgaged properties or to the income during the receivership, have been filed in this Court, either by way of interevention in said Cause No. 468, or in said Cause No. 517, or by plenary suit against said Receiver, to all of which bills in intervention and plenary suits the plaintiff herein, as Trustee, is a party defendant or respondent; and it further appearing that divers suits have been filed against said Receiver, in this Court, and in other courts, arising out of the operation of the properties hereinbefore described by said Receiver and his administration thereof;

Therefore, the said lien of the plaintiff and any sale hereunder, or the proceeds thereof, as hereinafter provided, are subject likewise to the expenses of administration, incurred in said Cause No. 468, including the expenses of the receivership and the administration of the receivership estate, and are also subject to all claims and demands which may be awarded priority to the claim of the plaintiff herein, against said Receiver, and said estate, in said Cause No. 468, or in any said suits against said Receiver, as the same may have been or may hereafter be adjudged and determined either by this Court, or any Court in which said suits may lawfully be pending, or upon any appeal, lawfully taken from



any decree of this Court in said Cause No. 468, or of this Court or any other Court in said plenary or independent suits;

The intervening claims pending in said Cause No. 468, herein referred to, are as follows:

(a) Cross-bill in the nature of intervening petition by Westinghouse Electric & Manufacturing Company, wherein and whereby said Westinghouse Electric & Manufacturing Company claims specific property otherwise covered by the plaintiff's said mortgage, by way of title reservation, in priority to the mortgage and the claims of the plaintiff thereunder, and of other creditors, or a preference right to the extent of the purchase price thereof, to-wit, \$45,761.44, and further claims a preference on account of material and supplies furnished to the defendant, Railway Company, upon distribution of the proceeds of any sale herein, in priority to the mortgage indebtedness in the sum of \$13,954.15.

(b) Cross-bill in the nature of intervening petition by I. P. Morris Company, wherein and whereby said intervenor claims preference in the distribution of the proceeds of sale of the properties of the defendant, Railway Company, prior to the mortgage indebtedness, in the sum of \$26,844.21 on account of materials and supplies furnished to said defendant, Railway Company.

(c) Intervening petition of John A. Roebling's Sons Company of California, wherein and whereby said intervenor claims preference in distribution of the proceeds of the sale of the prop-

erties of the defendant, Railway Company, in priority to the mortgage indebtedness, in the sum of \$21,057.37 on account of material and supplies furnished to said defendant, Railway Company.

(d) Intervening petition of General Electric Company, wherein and whereby said intervener claims preference in distribution of the proceeds of the sale of the properties of the defendant Railway Company in priority to the mortgage indebtedness in the sum of \$2,475.92 on account of material and supplies furnished to the defendant Railway Company.

(e) Intervening petition of the American Steel & Wire Company wherein and whereby said intervener claims preference in the distribution of the proceeds of sale of the properties of the defendant Railway Company in priority to the mortgage indebtedness in the sum of \$1,180.05 on account of material and supplies furnished to said Railway Company.

\* \* \* \* \*

In so far the prior rights and claims mentioned in this paragraph are essentially claims to priority in distribution of the proceeds of any sale of the mortgaged properties, or are claims for money demands, against the Receiver and the estate in his hands on account of the administration of the receivership estate, to-wit: The petition by Westinghouse Electric & Manufacturing Company for preference in distribution referred to in sub-paragraph (a) hereof; the petition of I. P.

Morris Company for preference referred to in sub-paragraph (b) ; the petition of John A. Roebling's Sons Company for preference referred to in sub-paragraph (c) ; the petition of General Electric Company for preference referred to in sub-paragraph (d) ; the petition of American Steel & Wire Company for preference referred to in sub-paragraph (e) ; the petition of Hot Point Electric Company claiming income, etc., referred to in sub-paragraph (g) ; the suit of Daisy B. Henton against said Markhus, referred to in sub-paragraph (j), and any other prior rights or claims to priority in distribution of the proceeds of sale, or for money demands as herein provided for, the sale of the premises hereinafter decreed shall be free from said claims, and they shall be transferred to the proceeds of the sale, and the Receiver shall retain in his hands sufficient of said proceeds to meet said claims as they may be finally established, or shall take satisfactory security, to be approved by the Court, from the holders of bonds secured by the mortgage to plaintiff, to satisfy and discharge said claims as a condition of distributing to them the amount which may be so required to satisfy any of said claims then contingent, undetermined or in litigation, and not finally established.

And by said decree it was further provided, particularly by Paragraph Twentieth, as follows:

None of the provisions of the decree shall be construed as establishing a lien in favor of the

trustee or bondholders upon the income, including earnings uncollected, or any part of the income earned during the receivership, or foreclosing the claims of general creditors to have such income distributed to them, and in harmony with the theory and understanding of the Receiver and the Court in applying and permitting to be applied from time to time portions of such income to the discharge of interest upon underlying bonds, indebtedness incurred for construction work, sinking fund and other non-operating purposes; so much of the funds received upon a sale of the property as are necessary to restore to the receiver the amounts so expended, shall be deemed to have the status of operating income arising during the receivership and in the hands of the Receiver, the rights of all claimants, including the plaintiff trustee, thereto to be determined in said Cause No. 468.

Following the decree of foreclosure, and on, to-wit, June 14th, 1915, the property described in the plaintiff's bill in said Cause Number 517, and in the decree, was sold by the Master appointed by decree to make said sale, for to-wit the sum of \$4,542,750.00, and the sale was on June 21st, 1915, regularly confirmed, and deed thereafter delivered to the purchaser thereof, the Electric Investment Company, a corporation. The sum realized from the sale was sufficient to pay a dividend of \$534.15 on each \$1000.-00 bond decreed by the Court to be outstanding under the mortgage to the plaintiff in said Cause Number



517, the Guaranty Trust Company of New York, and such dividend was thereafter paid by the Master.

After the entry of the foreclosure decree and on April 26th, 1915, the Court entered its memorandum decision on the intervening petitions or cross-bills hereinbefore mentioned, in which some of the claims were allowed in part and disallowed in part and others were disallowed *in toto* as preferred claims, the amount disallowed being allowed as claims of general creditors. All of which more fully appears in the decree which is included within the transcript of record.

Following this decision and after the disposal of other questions involved in the administration suit Number 468, final decree was entered in said suit on, to-wit, December 20th, 1915, and is set forth in full in the transcript of record. The dividend allowed by the decree and subsequent orders to general creditors, including the interveners or claimants of preferred claims in so far as their claims were allowed as general creditors' claims, was Three and 22/100c (.0322) on the dollar of their claims.

\* \* \* \* \*

This stipulation shall constitute a part of the record on appeal, and shall be in lieu of the transcript of such files and papers as would otherwise be required to substantiate the facts herein stipulated, except as it has been stated, that such papers shall be included in the transcripts of record. It shall therefore be sufficient upon the appeal to the Circuit Court of Appeals from the decree, by any of the herein mentioned intervening claimants to preference or prior-

ity in distribution of income earned by the receiver or proceeds of foreclosure sale, to include within the record, in addition to this stipulation and such files and papers as are necessary to show the jurisdiction of the Appellate Court, the following files and papers, to-wit:

Original Bill in Number 468,

Answer in Number 468,

Order appointing receiver in Number 468,

Bill or Cross-bill of such intervening claimants as desire to appeal, with all answers or responsive pleadings, and stipulations of fact or for hearing on the intervening petitions, and transcript of testimony taken upon said hearing,

Memorandum decision of the Court on the intervening claims, dated, to-wit, April 26th, 1915, and

Final decree in Number 468, dated December 20th, 1915.

Provided, however, that any party to such appeal shall have leave, by *praecipe* to the Clerk, to direct the inclusion in the transcript of the record of any other file or paper, not mentioned in this stipulation, which he may deem necessary to a proper presentation of the appeal.

*Dated* this 24th day of April, A. D. 1916.

BEVERLY L. HODGHEAD,

Solicitor for John A. Roebling's Sons Company of California, a corporation, Intervener and Appellant, and I. P. Morris Company, a corporation. Cross-complainant and Appellant.

JOHN F. MacLANE,  
Solicitor for Idaho Railway, Light & Power Com-  
pany, a corporation, and O. G. F. Markhus, Re-  
ceiver thereof, Defendants and Appellees.

WYMAN & WYMAN,  
Solicitors for Guaranty Trust Company of New  
York, a corporation, Trustee, Appellee.

JOHN F. MacLANE,  
Solicitor for Electric Investment Company, a cor-  
poration, Appellee.

WOOD & DRISCOLL,  
Solicitors for American Steel & Wire Company, a  
corporation, Appellee.

HAWLEY & HAWLEY,  
Solicitors for General Electric Company, a corpora-  
tion, Appellee.

PERKY & CROW, B. S. CROW,  
Solicitors for Westinghouse Electric & Manufactur-  
ing Company, a corporation, Appellee.

Endorsed: Filed May 19, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

In Equity—No. 468.

STATEMENT OF EVIDENCE UNDER EQUITY  
RULE NO. 75, ON THE APPEAL OF I. P. MOR-  
RIS COMPANY AND JOHN A. ROEBLING'S  
SONS COMPANY OF CALIFORNIA, INTER-  
VENERS AND CROSS-COMPLAINANTS.

*Be It Remembered* That this cause came regularly on for trial before the Court sitting in equity on the 19th day of June, 1914, on the bills in intervention or cross bills of John A. Roebling's Sons Company of California and I. P. Morris Company, and that the following testimony was given in support of the claims of preference of the I. P. Morris Company and the John A. Roebling's Sons Company of California, under their bills or cross bills involved in this appeal.

*O. G. F. Markhus*, Receiver, heretofore duly sworn, upon being recalled, testified in substance as follows:

DIRECT EXAMINATION BY MR. HAGA.

I am familiar with the facts stated in the stipulation handed me and filed herein marked "I. P. Morris Exhibit No. 1", being a statement of facts relative to the cross-bill of the I. P. Morris Company for preference. The facts therein stated are true. I furnished most of the data, if not all of it, that is set forth in that stipulation. Shortly after being appointed Receiver in this proceeding I made an application or petition to the Court for certain repairs and improvements on what is known as the Swan



Falls plant. The second paragraph of my petition for authority to make improvements reads as follows:

“Repairs on Swan Falls water wheels:

“Certain of the water wheels at the Swan Falls power plant are in disrepair and parts thereof need replacing. The details of such repairs and replacements are stated in the report of Mr. Trenner, attached hereto, marked Exhibit ‘C’. The estimated cost of such repairs and replacements is \$3,000.”

Exhibit “C” referred to in the extract just read reads as follows:

“Boise, Idaho, January 27th, 1914.

“Mr. O. G. F. Markhus,

“Receiver Idaho Railway, Light & Power Co.,

“Boise, Idaho.

“Dear Sir:

“One of the 850 K. W. wheels at the Swan Falls plant suffered an accident shortly prior to your appointment as Receiver, the runner being completely demolished and the casing partly destroyed. An order for the parts was at once placed with Allis-Chalmers Company, the manufacturer of the wheel, but was not recognized by them by reason of the non-payment of an old disputed account. They demand payment in advance before manufacturing these parts. The wheel is entirely out of commission, reducing the capacity of the plant accordingly, and the power which such wheel is capable of generating is ab-

solutely necessary to supply this season's business. Prompt action is therefore necessary. The manufacturer's cost of the replacements is \$1,575.00. The cost of freight, hauling, labor and incidental expenses will make the total cost of this repair approximately \$3,000.00. I earnestly recommend authority for this work to be obtained from the Court forthwith.

"Very truly yours,

"W. H. TRENNER,

"Superintendent."

Mr. Trenner, who signed this report, was working for me as Receiver, is a competent employee. The permission or authority to make the improvements requested was granted by the Court and the improvements have been made. I consider them most necessary.

The amount of the authorized capital stock of the Idaho Railway, Light & Power Company is \$30,000,000. Of this amount \$3,625,400 preferred and \$12,566,200 of common has been issued. The date of the contract with the I. P. Morris Company is October 31, 1912. The order for the material purchased from John A. Roebling's Sons Company was made about March, 1913, after the improvements or enlargements of the Swan Falls plant were started. There was considerable haste about getting the Roebling material. The occasion for it was the building and early completion of the Swan Falls-Gem transmission line. I don't know about any actual contract for furnishing power over that line before the order for

material from John A. Roebling's Sons Company, but we were under obligations to furnish power to the Gem District. That is why we rushed the order or rather were in haste to get the material for the building of that line. The order was placed here. I don't recall who instructed me to give the order, but we got instructions from New York. Some one advised us of the necessity of building that line in order to fill those power requirements of the Gem District. I don't believe the order contained the information where the material was to be used. I am also familiar with the stipulation of facts handed me and filed herein marked "John A. Roebling's Sons Company Exhibit No. 1". I have read the stipulation, and the facts therein stated are true. I am acquainted with Samuel L. Fuller. He lives in New York City. Prior to my appointment as Receiver in this case I was General Manager of the Idaho Railway, Light & Power Company, and have occupied that position since that company was organized. Samuel L. Fuller is the Vice-President of the Railway Company, and with respect to finances he was in fact its managing director but not in respect to the technical or the detailed management of its affairs; I had charge of that. Mr. Fuller was at the head of the syndicate. Mr. Watson at one time was managing director and he was later followed by William and Sinclair Mainland.

CROSS-EXAMINATION BY MR. WYMAN.

I do not recall any correspondence with the John A. Roebling's Sons Company concerning the material

they furnished. I think our dealings were directly with the representative of Roebbling's, and he no doubt was made acquainted with where the wire was going and the purpose for which it was to be used, in the construction of the Swan Falls-Gem District extension. The material consisted of copper cable for transmitting power, approximately ninety miles of copper cable, I think No. 1 B and S size. I think the order was given in March, 1913. I do not recall when the actual contract was made with the Gem Irrigation District; it is quite likely it was in April following. I can ascertain the date.

MR. HAGA: I can give you that date—March 4th.

MR. MacLANE: March 4th was the date of the contract between the Crane Falls Company and Gem Irrigation District. The question is, whether the Idaho Railway, Light & Power Company assumed that contract.

MR. WYMAN: The date I wish, Mr. Markhus, is the date when the Railway Company assumed the contract for furnishing power.

MR. MacLANE: I can give you that date approximately.

MR. HAGA: Mr. Wyman, if you are going to assume that the date in the written contract is the actual date of the agreement for the assignment of that contract, then we want to take depositions on that point.

MR. WYMAN:

Q. Now, Mr. Markhus, in regard to these wheels,



etc., of which you have just testified that the repairs and replacements amounted to \$3000.00, that was no work upon which I. P. Morris furnished any material or did any construction?

A. No, sir.

Q. It referred entirely to other units in the Swan Falls plant than those upon which I. P. Morris Company did furnish material and did do construction work?

A. Yes, sir.

#### REDIRECT EXAMINATION.

The transmission line from Swan Falls to the Gem Irrigation District is approximately thirty miles in length. The Idaho Railway, Light & Power Company owned in the neighborhood of two hundred miles—no—something over one hundred miles of transmission line, there being three wires to each line. A transmission line of one hundred miles would have three hundred miles of wire. My understanding is that the John A. Roebling's Sons Company was at one time offered notes for its claim but declined to accept them. I don't know who the members of the syndicate are which Mr. Fuller referred to, I only know our own directors and the Board Executive Committee, which I presume is the syndicate.

At 2 P. M., being recalled, the witness further testified:

I have examined the records in possession of the Receiver relative to the Idaho Railway, Light & Power Company transmission lines and the amount of wire it owns. The total number of miles of wire,

including transmission, distribution, trolley and trolley-feeders owned by the Company is about 790 miles, counting single wire. In some cases the lines have three wires to a line. In the distribution system there may be what is called a four-wire, three-phase system, the fourth wire being neutral; in other cases, only one wire. The net earnings for light and power during January, February and March, 1914, during my receivership are somewhat lower than they were during the same months for 1913, due principally to the extraordinary repairs at Swan Falls and also to the great reduction in the sale of power to the Idaho Traction Company, amounting to an average of about, I would say, \$2000 a month. This reduction was due principally to the falling off of business on this lower schedule on the traction system.

#### CROSS EXAMINATION.

The wire used for transmission purposes is not serviceable for trolley purposes.

I have examined the books in the hands of the Receiver for the purpose of determining the holders of bonds of the Railway Company held as collateral. The total amount out as collateral is \$2,465,000.00, held as follows: Kissel, Kinnicutt & Company, \$427,000; Chase National Bank, \$338,000; Winslow-Lanier & Company, \$225,000; Slick Brothers, \$42,000; Westinghouse Electric & Manufacturing Company, \$31,000; Allis-Chalmers Company, \$91,000; Colonial Trust & Savings Bank, \$625,000; W. and S. Mainland, \$40,000; and in the treasury \$646,000, in

order to make up that \$2,465,000 total. I would like to explain that the W. and S. Mainland is not a straight collateral, that \$40,000.

The present amount of bonds outstanding is \$9,-095,000.

REDIRECT EXAMINATION.

The bonds in the treasury that I have referred to have been certified and are left in the treasury, not having been made use of. They amount to \$646,000 and are included in the \$9,095,000 outstanding.

By stipulation, the claimants read into the record certain portions of the deposition of Mr. Samuel L. Fuller taken in another proceeding, subject to any objection which might have been made or which might be made by the parties in interest to the materiality of the testimony. Before reading the deposition, the following colloquy took place:

MR. MacLANE: I wouldn't concede that any of the testimony would be material, but simply that Mr. Fuller would so testify if his deposition were taken in this case as he had in the other.

THE COURT: Is that agreeable to all?

MR. WYMAN: If your Honor please, I desire to save an exception, and make the objection—never having read the evidence that is now being offered—as to its materiality in this case; and further, if Mr. Haga is to read portions of the record, there may be other portions which I may desire to point out and may wish to have go into the record.

MR. HAGA: There is no objection to it.

THE COURT: You simply reserve the right to object to its materiality?

MR. WYMAN: Yes.

MR. HAGA: So far as its having been taken in another case, that is waived?

MR. WYMAN: Yes.

MR. HAGA: And his testimony shall have the same force and effect as if taken in this case?

MR. WYMAN: That is perfectly satisfactory.

Mr. Haga then read from the deposition, which, in substance, was as follows:

DIRECT EXAMINATION BY MR. MACLANE.

My name is Samuel L. Fuller. I reside in the State of New York and am a member of the banking firm of Kissel, Kinnicutt & Company, principal office 14 Wall Street, New York.

MR. WYMAN: Mr. Haga, may I ask if you will state to the Court generally the nature of the testimony you are about to offer, or which you are offering, so that the Court may know in advance something in reference to the matter.

MR. HAGA: It shows the relation of Samuel L. Fuller and his associates and the syndicate which advanced the money for the Idaho Railway, Light & Power Company to the company and to the management of the company, and to the bonds which are being foreclosed in this action.

MR. HAGA (Reading):

"Q. When did you first become acquainted with the properties of the Idaho-Oregon Light & Power Company, the defendant in this action?

A. As I remember it, it was first brought to my attention in the early part of 1911, when a Mr. Cox,



who was acquainted with one of the employes in my office, spoke to him about this business, and the employe in my office gave me a copy of a report made by Messrs. J. G. White & Co., which I read; and as a result of going over that report I told the employe in our office that the business did not interest me. Later Mr. Cox got in communication with Mr. Watson, who was then in our employ, and told Mr. Watson that if we would send out some one to look over the property and the country that he would stand the expense of such an examination. As we at all times keep an organization to look up properties of all sorts, every year, where it can be done without expense to us, in the hope of getting pieces of business, Mr. Watson, with my approval, sent one of the employes of the company that I am interested in, in Duluth, to Boise, who made an examination of the territory and the properties of the Idaho-Oregon Light & Power Company, and as a result of that examination, which was favorable, we went back and looked into the situation more in detail."

MR. HAGA: The witness is then shown certain contracts by counsel examining.

"Q. There is a reference in that contract to the acquisition of the Swan Falls power plant, and further reference to a new company to be organized to take the title to that plant. Will you state the reasons for such references?

A. When we looked into the Idaho-Oregon Company, its financial situation and its business, and the demand for its power from the territory which it

served, we found that the Idaho-Oregon Company had one very weak situation, and that was that it did not have sufficient power to fulfill the demands that it would be called upon to fill during the following years. The Idaho-Oregon Company had been buying some power from time to time from a plant called the Swan Falls plant, down on the Snake River, and the Mainlands, who were in charge of the Idaho-Oregon property, said and recommended that the purchase be made of the Swan Falls plant, as such purchase was absolutely necessary to secure the Idaho-Oregon Company with the necessary amount of power which it required, and it was part of the original understanding between the syndicate which was formed to supply the money in this particular piece of business that the Swan Falls plant should be so purchased for these reasons. The syndicate therefore told Mr. William Mainland to begin and carry through, if possible, the negotiations for the purchase of this plant, and these negotiations were carried along in good faith, and to what we believed was a successful conclusion, as definite terms were arranged for the amount to be paid for this plant. At this time, contemporaneously almost with our advent into the territory——”

“Q. State when the company at present known as the Idaho Railway, Light & Power Company was organized.

A. In the State of Maine.

Q. When?

A. When was it organized?

Q. Yes.

A. It was organized contemporaneously with our entering into the field here and the purchase of the Idaho-Oregon bonds. I think it was organized practically at the same time.

Q. You don't remember the exact month?

A. No; I think it was about November, wasn't it, November 11th?

Q. I am asking you.

A. I don't remember.

Q. What were the reasons for the formation of the company at that time.

A. The syndicate found themselves in possession of these properties which they had bought in order to protect the Idaho-Oregon situation, and it was necessary at that time to put those properties in some corporate form. The Idaho-Oregon Company was in no position financially, or its financial structure was not such that it could take in outside properties, and therefore the Idaho Railway Company was formed, with a sufficiently large capitalization and authorized bond issue to enable it to take care of its needs in the future and take over these properties at the actual cost price to the syndicate. After the Idaho Railway Company had obtained possession of the Boise Valley Railroad Company and the Swan Falls plant, it was then necessary to develop, as far as possible, the business of the Railway Company without interfering in any way with the business of the Idaho-Oregon Company, and in order to do that and accomplish that result the Idaho Railway purchased

the distributing systems in the towns of Nampa and Caldwell, so that they could get the whole profit of selling electricity in those communities, instead of just getting the profits they had previously gotten by selling the current at wholesale to the distributing companies in those towns. They also had their line running up the Boise valley here alongside the Boise Interurban Railway, and in a territory that had never been covered, and no intention of covering by the Idaho-Oregon Company. So they applied for franchise in Middleton, Star, and Eagle, and are now doing some lighting business in those towns. They also had, of course, the Boise Interurban Railway and the Boise Valley Railroad."

"Q. State how and when the Railway Company became the owners of the original syndicate's holdings of what was the bonds of the Power Company.

A. The syndicate found itself owning a large interest in the Idaho-Oregon Company, and also, for the benefit of the Idaho-Oregon Company and for the benefit of the entire situation, it built up here an absolutely independent and self-sustaining and what was going to be a profitable enterprise, consisting of a power plant, and a large interurban and urban street railway system, and they therefore, as the Idaho-Oregon Company was in no position financially to take over the properties of the Railway Company, and the syndicate had two interests, they thought it would be wise to turn over all of their interests in the Idaho-Oregon Company to the Idaho Railway Company, which they did, taking securities



of the same class from the Idaho Idaho Railway Company for the securities of the Idaho-Oregon Company, which they turned in to the Railway Company."

"Q. Will you state in that connection how many bonds of the Railway Company were originally issued?

A. About six and a half million bonds originally issued.

Q. How was that reduced to four and a half million?

A. By the syndicate which owned those bonds agreeing to take two million of convertible debentures to the adjustment bonds given by the Idaho-Oregon bondholders."

CROSS EXAMINATION.

"Q. How long have you been connected with the Kissel, Kinnicutt Company, Mr. Fuller?

A. Since 1906."

"Q. What was your business prior to your becoming connected with Kissel, Kinnicutt & Company?

A. I have always been a banker."

"Q. You have spoken frequently in your testimony of the syndicate, in connection with the affairs of the Idaho-Oregon Company. Who compose that syndicate?

A. There are a large number of different individuals, perhaps fifty or one hundred different people in the syndicate, scattered all the way—I think there are some interests up in Montana, New York, Philadelphia, Boston, New England.

Q. Does each member of the syndicate have a stated percentage of interest in the syndicate?

A. Yes.

Q. When was that syndicate organized?

A. That syndicate was organized in 1911.

Q. For the purpose of dealing with the Idaho-Oregon situation?

A. For the purpose of doing all the things that we have done here. It was not a bond syndicate; it was not formed with any purpose of buying bonds and selling them again; it was what we call a construction syndicate.

Q. It was organized specifically in view of these transactions here in southern Idaho?

A. It was organized to do such things as seemed wise, as appeared from time to time, and sufficient capital was provided in the beginning to carry the matter through to an ultimate conclusion.

Q. How is that syndicate managed?

A. That syndicate is managed by my firm, as syndicate managers.

Q. Kissel, Kinnicutt & Company?

A. Yes, sir.

Q. Of Kissel, Kinnicutt & Company, who specifically has charge of the affairs of the syndicate?

A. No one person. I suppose I am more active in the knowledge of the situation out here, but the syndicate and the financial end of it is run by the partners of the firm, of course.

Q. In connection with the Idaho-Oregon matters and the Idaho Railway matters you have personally had charge, have you not?

A. I have been more connected with them than anybody else in our firm.

Q. Who are the principal members of that syndicate?

A. What do you mean by the principal members?

Q. Those having the largest interest and having taken the most active part in the management of its affairs.

A. Well, I should think that we were the principal interests.

Q. By that you mean that Kissel, Kinnicutt & Company?

A. Yes; although we haven't by any means the largest interest financially. If you mean financial interests, we are not.

Q. Who has the largest financial interest?

A. Your Honor, do I have to answer the question with regard to the syndicate? It is a more or less confidential business relation between my firm and their clients."

The witness was excused from answering.

"Q. Will you state, Mr. Fuller, so far as concerns the officering and controlling of the Power Company and the Railway Company, who the persons are who are concerned in two or more of these matters, meaning the Railway Company and the Idaho-Oregon Company and the syndicate?

A. I would be very glad to explain that to you. There are, as you know, a number of the directors of the Idaho Railway Company.

Q. Eleven, I think.

A. I think there are eleven. Five or six of those directors represent the financial interests who are interested in the syndicate. They consist of myself, Mr. Richmond, Mr. Robert H. Wiggin, Mr. John D. Ryan, Robert W. Watson, who has been an operating man and connected with the property in that connection as a director, but he has no connection with the syndicate at all. Mr. Charles Sabin. He is a vice-president of the Guaranty Trust Company, and interested personally, the same as Mr. Wiggin.

Q. Has this syndicate engaged in other operations than those in southern Idaho that are connected with the Power Company and the Railway Company?

A. No.

Q. This is their sole activity so far?

A. Yes."

"Q. You have stated in your direct examination that a long time prior to the putting out of the plan or reorganization, which is dated March 26, 1913, two million dollars of the bonds of the Railway Company had been subordinated?

A. Agreed to be subordinated.

Q. Agreed to be subordinated to the other four and a half million?

A. Yes.

Q. The syndicate held the two million, you state?

A. The syndicate held all the securities.

Q. Who held the four and a half million?

A. The syndicate. The syndicate holds everything, Mr. Summins. I made that plain here yesterday."



“Q. What was the reason for dividing the holdings and making two million subordinate to the other four and a half?

A. Because we realized that our investment that had been made in the Idaho-Oregon property was of very questionable value, and we, as a syndicate, determined to wipe it off and take equity for it in some other form, and leave bonds outstanding only that we were certain the interest could be earned on, and a good surplus, and take the rest of our investment in junior securities. You may remember that in the purchase of the Idaho-Oregon Company, the Boise Interurban Company, that entire purchase price was not paid in cash by the syndicate, but they took preferred stock for the entire Boise Interurban purchase. No bonds were ever issued for that; no money was ever raised for it. The syndicate took preferred stock for the Boise Interurban. No bonds have ever been issued for that property at all.

Q. That had nothing to do with the Idaho-Oregon?

A. No, but I am illustrating to you that the syndicate was a syndicate formed not to buy bonds to sell them, but was a syndicate formed by strong interests all over the country out here who were willing to come out into this situation, with what appeared to be bright prospects, but later on turned out not to be so bright, but people who were willing to take those securities and wait until the company grew up, until they could sell their bonds.”

MR. HAGA: That is all, if the Court please.

MR. WYMAN: If your Honor please, I understand that all of this testimony has gone in subject to the objection as to its materiality.

THE COURT: Yes.

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ORDER SETTLING STATEMENT.

The above and foregoing statement of evidence being tendered to me for settlement and allowance, and it appearing to me that said statement was lodged in due time with the Clerk of this Court and that notice of such lodgment and of the time of the proposed settlement thereof was given by I. P. Morris Company and John A. Roebling's Sons Company of California through their solicitor to all parties to said appeal, and that no objection thereto has been made or filed, and the time for making objections having expired,

*It is hereby certified,* That said statement is in all respects true, correct and properly prepared and contains a full transcript of the evidence reduced to narrative form pertaining to the issues raised by the assignment of errors. Provided the exhibits therein referred to and particularly the extended Stipulation of Facts verified by the witness Markhus is incorporated or are deemed to constitute a part thereof.

Dated May 19th, 1916.

FRANK S. DIETRICH,  
District Judge.

Lodged April 28th, 1916, filed May 19th, 1916,  
W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

DECISION ON INTERVENTIONS OF JOHN A.  
ROEBLING SONS CO., AMERICAN STEEL &  
WIRE CO., I. P. MORRIS CO., GENERAL  
ELECTRIC CO., AND WESTINGHOUSE CO.

April 26, 1915.

Wyman & Wyman, Attorneys for Guaranty Trust  
Company,

Beverly L. Hodghead and Richards & Haga, Attor-  
neys for John A. Roebling Sons Co.

Wood & Driscoll, Attorneys for American Steel &  
Wire Co.

Richards & Haga, Attorneys for I. P. Morris Co.

Hawley & Hawley, Attorneys for the General Elec-  
tric Co.

Perky & Crow, Attorneys for the Westinghouse Com-  
pany.

J. F. MacLane, Attorney for Receiver.

*DIETRICH, DISTRICT JUDGE:*

On December 23, 1913, the Westinghouse Electric & Manufacturing Company, a general creditor, commenced a suit against the Idaho Railway, Light & Power Company, upon its own behalf and for the benefit of all creditors of the same class. At the same time it applied for and secured the appointment of a receiver to take charge of all the property of the Railway Company, consisting of a hydro-electric power plant, electric transmission and distributing lines, and electric railways, situate in Southwestern Idaho. On January 29, 1914, the Guaranty Trust Company of New York brought suit against the Railway Com-

pany for the foreclosure of a trust deed executed by the latter as security for the payment of its bonds, of which there are outstanding approximately \$9,000,000.00, face value. The receivership was thereupon extended to the foreclosure proceeding, and for certain purposes the two suits were consolidated. The interveners have come in in response to an order which was made and published requiring all creditors having claims for which priority over the lien of the trust deed was claimed to intervene within a stated period. Later it was held that the foreclosure suit was prematurely brought, and the same was, upon motion of the plaintiff, the Guaranty Trust Company, dismissed, and thereupon a new suit was commenced, which has recently resulted in the entry of a decree of foreclosure. The property, however, has not yet been sold, and the receivership still continues.

*Claim of John A. Roebling Sons Co.*

This claim is for \$21,057.37, besides interest, as the balance of an open account for copper wire furnished to the Railway Company by the claimant during the period from March 19, 1913, to May 17th. The whole account amounted to \$38,577.17, upon which various payments were made prior to the receivership, aggregating \$17,519.80.

The principal facts are incorporated in a written stipulation, to which is added the uncontradicted testimony of the receiver. The correctness of the account is conceded, and the only question is whether the claim falls within the class which in a foreclosure



receivership is sometimes recognized as having equities superior to the lien of the pre-existing mortgage or trust deed. The principle which the intervener invokes is of judicial rather than legislative origin, and in the multitude of decisions in which it has been considered and applied since the leading case of *Fosdick v. Schall*, (99 U. S. 235), there is naturally a want of entire harmony; as to its general features, however, there is substantial unanimity. The present controversy involves not so much a definition of the rule as a consideration of the circumstances under which exceptions thereto may be recognized in favor of the unsecured claimant. Generally speaking, debts for original construction work do not fall within the rule, but only expenses incurred in the ordinary operation and maintenance of the property. The doctrine rests upon the implied consent of the bondholders that the current income shall first be applied to the discharge of current expenses.

Again, the equity of the claimant extends only to the income and not to the corpus of the estate. In the case of improper diversion of the income, however, restoration will be made out of the proceeds of a sale of the property itself.

Generally, too, the application of the principle is limited to labor and supplies furnished within the period of six months immediately prior to the institution of the receivership. In a sense doubtless this limitation is arbitrary, but nevertheless it has come to prevail as a general rule. *Spencer v. Taylor Creek Ditch Co.*, 194 Fed. 635.

I am inclined to the view that for this last consideration alone the claimant must be denied a preference. Admittedly the latest item in the account is for material furnished more than seven months before the receivership was instituted and more than eight months before it was extended to the foreclosure suit. True, the time limit is not always observed, and instances may be cited where claims of much longer standing have been recognized, but if a rule at all, it must control in all cases which are not substantially exceptional. The discretion to relax it is a judicial discretion, resting upon something more substantial than mere whim or caprice. What reason can be assigned for treating the instant claim as an exception? It is a just debt and should be paid. But that is an appeal which any creditor of any insolvent debtor can make. The claimant expected to be promptly paid in the ordinary course of business, but such is the usual expectation. There were no misrepresentations, no deceitful promises, by which it was induced to remain inactive. Upon the whole, the case is one of ordinary commercial credit, typical, rather than exceptional.

Equally conclusive is the objection that the account is wanting in the essential characteristics of a preferential claim. With comparatively unimportant, if any, exceptions, the wire was furnished for new construction, and not for the repair or maintenance of the existing plant. Appreciating the strain in this branch of the case, the intervener seeks to attach an undue and unnatural significance to cer-

tain general phrases in the stipulation of facts. As disclosed by the stipulation, wire to the amount of \$91.82 was used for the Swan Falls construction, \$26,817.56 for the new Gem and Guffey transmission lines, \$1,121.15 for service lines at Eagle, and \$10,546.64 for the Idaho-Oregon Light & Power Company. The actual purposes for which these several items were used and the conditions surrounding the use are set forth in some detail, and then the stipulation closes with the following general paragraph: "All of the said wire has actually been delivered by the intervener to the Railway Company and devoted by the Railway Company to the purposes above specified, and is in use by the Railway Company (or by the Idaho-Oregon Company under said equipment trust agreement) as a part of the existing system, and has become a part of the Railway Company's system, has enlarged the same, and has contributed to the earnings and other values of the properties, and to the security of the bonds, and said material is and was necessary to the continued maintenance and operation of the respective parts of said property for which the same was supplied and in which it is used." It is in this last clause, namely, "and said material is and was necessary," etc., upon which the intervener relies. But even when taken alone this language does not signify that the wire was used for the purpose of repair or replacement, or that it was necessary to keep the plant a going concern. It is, of course, necessary to the maintenance and operation of those new parts of the system for the con-



struction of which it was used, and that is all. Any other view would be directly in the face of the concrete facts disclosed by other parts of the stipulation. The material so far as used by the Railway Company was employed not in repairing its existing system, but in enlarging it. Clearly such expenses are chargeable not to operation or maintenance, but to construction. It is possible that short service extensions and connections in a community already supplied with a general distributing system could be properly treated as necessary operating charges; this I do not decide. But surely there is no semblance of reason for holding that the extension of a long transmission line into a new territory and the installation of a new distributing system where there has been none before constitute expenses of operation. While the precise nature of the extension work at Eagle is not fully disclosed, it is thought that the facts shown are insufficient to warrant a finding that this item of \$1,121.15 was an operating expense. The items \$91.82 and \$26,817.56 are clearly for construction work. As to the other item of \$10,546.64, it is unnecessary to consider what status the claim would have if it were being asserted against the Idaho-Oregon Company. Certainly the material was not needed or used by the defendant for any purpose whatsoever, and therefore falls entirely outside of the scope of the rule.

Effort was made to show that the relation of the bondholders to the Railway Company was such as to estop the trustee from denying the intereviewer's



equity, but the evidence will not support a finding of that character. Essential elements of estoppel are wanting.

In denying the preference sought it is deemed proper expressly to refer to certain circumstances which are not disclosed by the record here, but of which we may take notice. (1) Apparently the wire furnished by the intervener to the Railway Company and by it turned over to the Idaho-Oregon Company constitutes a considerable portion of the "equipment trust claim," on account of which there has been awarded to the Railway receiver against the Idaho-Oregon estate approximately \$20,000.00. (2) The trustee has dismissed the foreclosure suit to which the receivership was extended on January 29, 1914, and has commenced a new suit. It is possible that the intervener should be recognized as having an equitable claim to a distributive share of the income of the Railway properties arising during the period of the receivership, and especially an equity in the equipment trust fund referred to. Apparently the original foreclosure suit was prematurely and therefore wrongfully brought, and that being the case should not general creditors have such advantage as they might have secured if no receiver had been appointed, or at least such benefit as would have accrued to them if the trustee had not come into court?

The denial of the preference presently sought will therefore be without prejudice to these questions, which are only suggested, not decided.

*American Steel & Wire Co.*

This claim is for \$1,180.05, also due on account of wire supplies. Of the material so purchased by the Railway Company all but \$62.22 worth was for use by and went to the Idaho-Oregon Company, \$694.04 by actual sale, and the balance by conditional sale under the equipment trust agreement. Only \$62.22 worth was furnished for or used by the Railway Company, and of this amount \$33.70 was prior to the six months period, and for that reason must be denied preference. Preference for that which went to the Idaho-Oregon Company must be denied because it in no wise constituted an operating expense of the Railway Company or a current debt contracted in the ordinary course of the business of that company. Surely the loaning of its credit to the Idaho-Oregon Company was not in the ordinary course of the business of the Railway Company. The fact that it owned most of the stock of that company and some of its bonds is not controlling. The stock may have been wholly worthless, and hence no substantial part of the security of the Railway bondholders, and its interest in the bonds may have been relatively unimportant. The case of *Southern Railway Co. v. Carnegie Steel Co.*, 176 U. S. 257, relied upon with apparent confidence by the claimant, is readily distinguishable, as is made manifest by this simple sentence quoted from the opinion: "The rights of the Carnegie Company, the claimant, are none the less because the Danville Company (the purchaser) chose, after obtaining the rails, to use a

part of them on roads under its control and in its possession, and whose preservation in proper condition was vital to its successful operation." If we assume that because it was the dominant stockholder the Railway Company had possession of and controlled the property of the Idaho-Oregon Company, it would be going far beyond the facts to say that the maintenance of the Idaho-Oregon plant in proper condition was vital to the successful operation of the Railway Company's system or any part thereof. While the relations of the two systems were such that there were common and mutual interests, the accruing benefits from the use of this material are too remote and contingent to serve as a basis for the application of the rule invoked. A preference can be granted only for the \$28.50. As in the case of the Roebling claim, the denial of the preference for the balance is without prejudice to the right to make claim to a share of the equipment trust fund and to the income during the receivership.

*I. P. Morris Co.*

This claim may be briefly stated as follows: Upon October 31, 1912, the claimant entered into a written contract with the Railway Company to furnish to the latter certain machinery for installation in its Swan Falls plant. On account of the contract there became due the claimant in the aggregate the sum of \$48,335.37, upon which payments were made amounting to \$21,200.66. For the balance of \$26,493.16 two promissory notes were given, each for the sum of \$13,246.58, each of date December 9,



1913, and each bearing interest at the rate of six per cent per annum from its date. No part of either of these notes, principal or interest, has ever been paid. The amount they represent, however, is subject to a credit of \$5,138.00 for extra parts called for by the contract but which the claimant has not furnished. In addition to the notes there is a balance due to the claimant upon open account of \$351.05. The machinery was used by the Railway Company in carrying out its plan of enlarging, rebuilding, and improving its generating plant, "by removing three 300 K. W. generating units, and replacing the same with two 1250 K. W. generating units, with the necessary foundations, wheel pits, gates, and tail races, and so arranged and placed that two additional 1250 K. W." units could be installed in the future.

In the view I have felt impelled to take, it is unnecessary to state the facts requisite to an understanding of some of the points argued. One consideration is controlling. Clearly the machinery was for the enlargement and not for the repair or the maintenance of the Railway Company's power plant. Nor was it required to enable it to perform obligations then existing to the public. True, by the new installation it was enabled to widen the scope of its service, but it was under no legal obligation thus to extend its field of activities. Surely it could not have been compelled by the mandate of a court or other tribunal to increase its capacity, nor would any one have had any remedy or right of action in his own



right or as a representative of the public, if it had failed or refused to make such enlargement. Furthermore, in considering the character of the work done, and also the sources from which it is reasonable to assume the claimant expected payment to be made, it will not do to compare the cost of the machinery purchased from the claimant with the aggregate value of all the Railway Company's properties. The latter owned not only the generating plant for which this apparatus was supplied, but also the transmission and distributing systems, and traction properties. The generating plant alone is here to be considered as the basis of comparison. What was the relation of the new work to this unit? And if we consider cost and values at all, what is the ratio of not merely the intervener's claim but of the entire cost of the new work, including the intervener's claim, to the cost or value of the whole generating plant? As is made plain by the stipulations and the testimony relating to this and other claims, this was not the only expense which the Railway Company was compelled to incur in order to increase its revenue. Some of the additional output, it is true, could be disposed of to new consumers upon existing lines, but not all. For the transmission and distribution of much of the current to be developed by the new installation new lines into new fields had to be constructed; and, besides, the intervener's claim was but one item in the expense of enlarging the power plant itself. In view of all these conditions, it is quite incredible that this

claimant or any or the claimants having knowledge of the plans of the Railway Company could have expected that this entire expense would be taken care of out of current receipts. The claim of preference is accordingly denied. *Porter v. Pittsburg-Bessemer Co.*, 120 U. S. 49. *Toledo, etc. Co. v. Hamilton*, 134 U. S. 296. *Wood v. Guaranty Co.*, 128 U. S. 416. *Thomas v. Western Car Co.*, 149 U. S. 145. *Southern Railway Co. v. Carnegie Steel Co.*, 176 U. S. 257.

*General Electric Co.*

This is a claim for \$2,475.92, of which amount \$346.42 is for current supplies furnished for the use of the Railway Company in maintaining and operating its plant during the six months period immediately prior to the receivership, and to that extent the claimant is entitled to a preference. About \$600.00 is for similar supplies, which, however, were not furnished within the six months period, and therefore cannot be preferred. The balance of the claim is for transformers and motors purchased for and delivered to the Idaho-Oregon Company more than six months prior to the receivership, and is therefore not entitled to a preference. The transformers (\$227.00) were embraced in the equipment trust claim against the receiver of the Idaho-Oregon Company, and the claimant may apply to share in that fund; and may also seek a distributive share in the receivership income.

*Westinghouse Company.*

Although plaintiff in the administration suit, the Westinghouse Company has also filed a complaint in

intervention or cross bill, in the foreclosure or consolidated suit. Its claim embraces several different classes of items, some of which are controlled by principles already discussed, while others involve distinctive considerations. . .

*FIRST.—Substation apparatus in the terminal at Caldwell.*—If I correctly understand the record, this is the identical apparatus covered by the intervention of the claimant here in the Idaho-Oregon receivership, where it has now been awarded complete relief. Such being the case, further consideration at the present time is unnecessary.

*SECOND.—The motor generator set located in the substation of the Idaho-Oregon Company at Boise.*—For the reasons explained in the opinion upon the claimant's intervention, just referred to, in the Idaho-Oregon receivership relative to the title of the apparatus in the Caldwell substation, it must be held that the intervener holds the title to this property, and it will therefore be permitted to reclaim it, and will also be paid a reasonable rental for its use during the receivership, unless upon terms to be agreed upon between the claimant and the receiver and approved by the Court the receiver elects to retain and pay for it, such payment to be made out of the funds arising from the foreclosure sale. *Gregg v. Mercantile Trust Co.*, 109 Fed. 220. Unless such adjustment is concluded before the sale, the master will be directed to sell subject to the claimant's rights, with the obligation upon the purchaser to relinquish the property and pay the rental or pay such price as it may agree upon with the claimant.



It is to be added that neither this claim nor that under the first subdivision falls within the scope of the rule of preference in case the property is returned and a rental paid for its use during the receivership. Aside from other considerations, the debts were incurred prior to the six month period, and the Caldwell claim at least was not for a current operating expense of the Railway Company.

*THIRD.—The machinery furnished by the claimant under a conditional sale agreement for installation at Swan Falls.*—This claim is thought to have the same status as that considered under the second subdivision, and similar relief will be awarded.

*FOURTH. — The open account for \$15,246.99 (\$13,645.57 after deducting credits).*—Following the claimant's classification of the items involved under this head, we have:

A. \$1,925.36 for articles which may properly be held to have been used for the maintenance of the Railway Company's system. But of this amount \$995.15 accrued prior to the commencement of the six months period, and therefore the amount of the preferential allowance will be only the balance, namely \$930.21.

B. \$2,537.94 was for construction work at Swan Falls, and is disallowed as a preference for that reason. It may be added that \$713.93 thereof accrued prior to the six months period.

C. \$990.85 was for construction work at Star and Eagle, and must be denied a preference, for the reasons stated in the discussion of the Roebling Sons



claim. Moreover, the larger part of the claim antedates the six months period.

D. \$5,209.00 represents equipment furnished to the Idaho-Oregon Company under the equipment trust agreement. It is therefore denied a preference. The claimant may, however, apply for a distributive share of the funds coming into the receiver's hands from that account.

It is also to be noted that \$2,821.77 of this item antedates the six months period.

E. \$1,747.22 falls under what is called the agency account with the Idaho-Oregon Company, and, for reasons already explained, it cannot be given a preference.

F. Just what status is claimed for what are classified in the intervener's brief as "*Sixth*," (\$2,053.52), and "*Sixth-a*," (\$782.84), is not made entirely clear, but it appears that both items were for equipment or material furnished to the Idaho-Oregon Company, and it is manifest that they can have no greater dignity than the equipment trust or agency items. The claimant may, if the facts warrant, show that on account thereof it is entitled to share in the equipment trust fund.

It will be observed that these several items aggregate \$15,246.99, but the Railway Company, such is the stipulation, is entitled to credits aggregating "\$1,601.42 by reason of a special discount on purchases under blanket contract covering re-sale apparatus and whatever additional small articles" are shown in the lists incorporated in the stipulation.

Just how it was intended this credit should be applied is left in doubt, but apparently it should go toward a reduction of the items for apparatus furnished (re-sold) to the Idaho-Oregon Company, and I have concluded to permit the claimant to elect to what item or items it shall be applied.

It is scarcely necessary to add that the claimant is not, by the conclusions herein stated, debarred from applying for a share in the income arising during the existence of the receivership.

Endorsed: Filed April 26, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

In Equity—No. 468.

FINAL DECREE.

This cause came on to be heard at this term and was argued by counsel and thereupon upon consideration thereof, it was ordered, adjudged and decreed, as follows; viz.:

1. That all the allegations of the bill of complaint, not inconsistent herewith, are true and correct. That defendant Idaho Railway, Light & Power Company, hereinafter called the "Railway Company," was at the time of filing the bill herein, and is now completely insolvent. That O. G. F. Markhus, a citizen and resident of the State of Idaho, herein appointed Receiver of said defendant Railway Company has sequestered the properties and impounded the income of said defendant for the benefit of creditors, as their interests may appear, and the estate

of said defendant, including its properties and the income thereof, during the receivership should be, and hereby are, administered and disposed of for the benefit of all such creditors as hereinafter adjudged and decreed.

2. Prior to the commencement of this action, defendant Railway Company having made, executed and delivered to the Guaranty Trust Company of New York its mortgage securing an authorized issue of \$30,000,000 first and refunding sinking fund 5% gold bonds, under which divers bonds had been issued and were outstanding; the said Guaranty Trust Company of New York, after the filing of plaintiff's Bill herein and on, to-wit: January 14, 1914, filed its Bill (docketed as No. 470) for a foreclosure of said mortgage on account of certain defaults alleged in such Bill. Thereafter and on, to-wit: January 19th, 1914, the said cause No. 470 was consolidated with this cause, under the number and title of said cause No. 470 for the purposes of administration, and proceedings were had in said consolidated cause until on, to-wit: December 17, 1914, when, pursuant to proceedings had in the said foreclosure cause No. 470, the said cause No. 470 was dismissed without prejudice, and thereafter and on the same date, to-wit: December 17th, 1914, the said Guaranty Trust Company of New York filed a new Bill of Foreclosure against said defendant Railway Company and other defendants therein named, which was docketed as No. 517, and such proceedings were had upon said bill that on, to-wit: April 19th, 1915, Decree of Fore-

closure and Sale was entered by which said Decree it was ordered, adjudged and decreed that there had been certified, delivered, issued and were outstanding bonds of the Railway Company secured by the mortgage to the said Guaranty Trust Company of the aggregate par value of \$8,449,000, and that default had been made thereon, and the principal thereon with certain interest was therein decreed as due. By said decree, Receiver herein, O. G. F. Markhus, was appointed Special Master to sell all properties of every kind, nature and description of the defendant Railway Company to satisfy the claim of the said Guaranty Trust Company of New York, and the holders of bonds secured by the mortgage to said Guaranty Trust Company of New York, and said Special Master proceeded to sell the said premises as directed by the decree, and did sell the same to Electric Investment Company, which said sale was confirmed by the Court in order dated June 21, 1915. It appearing to the court that the purchaser has complied with all the obligations of the bid and the order of confirmation, as has been decreed in said cause No. 517, it is ordered, adjudged and decreed that said sale and the various proceedings in said cause No. 517 are hereby confirmed in this cause, and the title to said properties is hereby vested in the purchaser, Electric Investment Company, free from any lien, claim or demand in these proceedings, and prior lien or claim of the holders of the bonds secured by said mortgage to the Guaranty Trust Company of New York upon the proceeds of said sale (except as here-



inafter specifically decreed) is hereby recognized and confirmed.

3. During the pendency of said cause No. 470 and on, to-wit: June 15th, 1914, the Receiver was directed to pay from the income accruing during the receivership, as operating and maintenance expenses accruing within six months prior to his appointment as Receiver, divers and sundry claims aggregating \$10,847.39, which said payment having been made pursuant to directions of the Court, is hereby confirmed, and is charged against the proceeds of sale in said cause No. 517.

That in addition to the said claims so paid by the Receiver pursuant to said order of June 15th, 1914, the following claims to priority or preference in the distribution of the proceeds of sale were presented by intervening petitions, pursuant to order of the court permitting the filing of the same, to-wit:

John A. Roebling Sons Company of Cali-

fornia .....	\$21,057.37
American Steel & Wire Company.....	1,180.05
I. P. Morris Company.....	26,844.21
General Electric Company.....	2,475.92
Westinghouse Electric & Mfg. Co.....	15,246.99

Pursuant to stipulation of parties, said cause No. 470 during the pendency and under the caption of which these claims were filed, when dismissed was dismissed without prejudice to the said preferential claims and jurisdiction was reserved to determine the same in this proceeding and to charge any amounts allowed said claimants as preferred claims

against the proceeds of sale in cause No. 517. Evidence having been introduced in support of said claims and each thereof and the same argued and submitted to the court for decision, it is hereby *ordered, adjudged and decreed* that the said claims and each thereof be disallowed as preferred claims (but without prejudice to their allowance as general creditors' claims) except as follows, to which extent, and only to which extent, the said claims are allowed and are charged as first liens against the proceeds of foreclosure sale in said cause No. 517, to-wit:

American Steel & Wire Company.....	\$ 28.50
General Electric Company.....	346.42
Westinghouse Electric & Mfg. Co.....	930.21

In addition to the foregoing claims to preference, the Westinghouse Electric & Mfg. Company, also by its bill of intervention claimed as a lien against the proceeds of sale the sum of \$31,447.51 with interest, or in lieu thereof decree awarding it prior title to certain apparatus furnished by it to the Railway Company under contracts of conditional sale, by which title to said apparatus was reserved until the same should be paid for.

This said claim having been allowed, and the Special Master having paid the same from the proceeds of sale pursuant to directions of the Court heretofore made, such payment is hereby approved and confirmed and the amount thereof charged against the said proceeds of sale in cause No. 517.

4. The Court on or about December 28th, 1914, having entered an order directing the general credit-

ors of defendant Railway Company to file their claims on or before April 1st, 1915, the Receiver under date of April 27th, 1915, having reported to the Court the claims so filed, together with proof of due publication and mailing of said order of December 28th, 1914, as required thereby, and the Court having ordered all objections or exceptions to said claims to be filed with the Clerk on or before June 1st, 1915, and having set June 14th, 1915, for hearing of said objections or exceptions, due notice of said last mentioned order likewise having been given and filed, and the matter coming on to be heard and submitted for decision, the Court upon hearing thereof having allowed claims, which after deducting all credits and offsets, and computing interest thereon to December 1st, 1915, are as follows, to-wit:

(1)	Westinghouse Electric & Manufacturing Company . . . . .	\$ 45,761.44
	This claim having been paid in full since the allowance thereof, and released balance remaining thereon is . . . . .	000.00
(2)	Westinghouse Electric & Manufacturing Company . . . . .	14,791.29
(3)	Westinghouse Electric & Manufacturing Company . . . . .	27,989.35
(4)	Bates & Rogers Construction Company . . . . .	17,585.00
(5)	Bates & Rogers Construction Company . . . . .	25,137.80
(6)	Bankers Trust Company . . . . .	567.85

(7)	Hot Point Electric Heating Company .....	215.32
(8)	Alfred E. Norton.....	2,757.91
(9)	Allis-Chalmers Manufacturing Company .....	100,100.00
(10)	General Electric Company....	2,759.99
(11)	Anna Noble Executrix.....	11,585.00
(12)	C. R. Shaw.....	13,438.60
(13)	Idaho Hardware & Plumbing Company .....	63.17
(14)	Carlson-Lusk Hardware Company .....	11,585.00
(15)	Viele, Blackwell & Buck.....	13,492.20
(16)	American Steel & Wire Company .....	1,353.24
(17)	Western Lumber & Pole Company .....	605.93
(18)	B. J. Carney & Co.....	3,395.21
(19)	Wm. & S. Mainland.....	1,496.08
(20)	Wm. & S. Mainland.....	497.10
(21)	Nampa Department Store....	196.57
(22)	Guaranty Trust Company of New York .....	945.13
(23)	Guaranty Trust Company of New York .....	795,352.55
(24)	Guaranty Trust Company of New York .....	3,751.585.50
(25)	I. P. Morris Company.....	30,239.33
(26)	John A. Roebling Sons Company of California.....	24,960.29
(27)	Murphy Lumber Company....	200.91
	Total .....	<u>\$4,852,886.32</u>



The Court does hereby *order, adjudge and decree* that said amounts and each of them are due to the respective claimants above named from said defendant Railway Company, and they, and each of them, have in form and effect a judgment against said defendant Railway Company, and said claims are entitled to be paid equally and ratably without preference or priority of one over the other, from any assets in the hands of the Receiver of said Railway Company available for such payment, as hereinafter decreed. Said claims, and the judgment hereby awarded thereon, are inferior and subordinate to the preferred claims above mentioned, and to the decree in favor of the Trustee in said cause No. 517, and are not a lien against any of the property covered by said decree, but the said property in the hands of the Electric Investment Company, the purchaser, is free from any said lien, and said judgments are only enforceable to the extent that there are assets hereinafter prescribed available for the payment thereof, or insofar as there may be property or rights of defendant Railway Company elsewhere than in the State of Idaho, and not covered by the said Decree of Foreclosure.

In so far as any of said bonds are secured by bonds of defendant Railway Company, or other collateral, all dividends paid by the Special Master upon said bonds, or proceeds of other collateral, shall be deemed credited upon said claims, and the judgment hereby awarded shall not be enforced except for the deficiency remaining after the application to the re-

duction of said claims, of any said dividend, proceeds of other collateral, and the dividend hereinafter declared, from the funds in the receiver's hands.

5. The claim of E. H. Jennings against defendant Railway Company for the sum of \$183,800 and his exceptions to the report of the Receiver are hereby disallowed and over-ruled.

The claim of Westinghouse Electric & Manufacturing Company against the proceeds of the so-called Idaho-Oregon Equipment Trust account in the hands of the Receiver is hereby allowed in the sum of \$2,500.00.

The foregoing claim of the Guaranty Trust Company of New York, as Trustee, listed as number 24, is for the deficiency remaining due upon \$6,630,000.00 face and par value of bonds of defendant Railway Company after the application of the proceeds of sale to said bonds, and is in addition to and not subject to reduction by the dividend upon said bonds resulting from distribution of proceeds of foreclosure sale in said cause No. 517.

6. The Receiver having filed herein his final report and account, and due notice thereof and of the time for settlement having been given, and all objections or exceptions thereto having either been withdrawn or over-ruled by the Court upon the hearing thereof, said final report is in all things confirmed and accepted by the Court and the Receiver is to be deemed charged and credited with the amounts shown by said final report and account to be respectively charged and credited to him, and said re-

port is adopted as a basis for the distribution hereinafter decreed.

7. The decree of foreclosure in said cause No. 517 contains, among others, the following provision (Paragraph Twentieth) :

“None of the provisions of the decree shall be construed as establishing a lien in favor of the trustee or bondholders upon the income, including earnings uncollected, or any part of the income earned during the receivership, or foreclosing the claims of general creditors to have such income distributed to them, and in harmony with the theory and understanding of the Receiver and the Court in applying and permitting to be applied from time to time portions of such income to the discharge of interest upon underlying bonds, indebtedness incurred for construction work, sinking fund and other non-operating purposes; so much of the funds received upon a sale of the property as are necessary to restore to the Receiver the amounts so expended, shall be deemed to have the status of operating income arising during the receivership and in the hands of the Receiver, the rights of all claimants, including the plaintiff trustee, thereto to be determined in said Cause No. 468.”

Pursuant to the reservation of jurisdiction so contained in said decree, the plaintiff in said Cause No. 517, Guaranty Trust Company of New York, having filed in this Cause on December 19, 1914, its petition seeking to impound the income and assets in the pos-



session of the Receiver for the benefit of the bondholders represented by it, and the plaintiff herein, Westinghouse Electric & Manufacturing Company, and the Hotpoint Electric Company, having filed petitions seeking to charge the Trustee and the bondholders represented by it with all payments made by the Receiver from income for bond interest and sinking fund on underlying mortgages upon divisional properties of defendant Railway Company, prior in lien, to the general refunding mortgage to the said Guaranty Trust Company of New York, and further seeking to impound for the benefit of themselves and all general creditors of defendant Railway Company all the income of the receivership, and the said petitions coming on to be heard pursuant to order of the Court and notice to all parties and creditors who had filed claims in the proceedings, and the Court having considered the same and having, to-wit: on November 10th, 1915, made and filed its decision in writing upon the matters presented by the said petitions, it is *ordered, adjudged and decreed*:

(a) That the said petition of the Guaranty Trust Company of New York is sustained and the relief thereby prayed for, to-wit, the impounding of the income for the benefit of the said Guaranty Trust Company of New York and the bondholders represented by it, is granted as to all income received and collections of cash made by the Receiver (except as herein otherwise expressly decreed) subsequent to the date of the filing of said petition of said Guaranty Trust Company of New York, to-wit, December 19,



1914; and said petition is denied and dismissed, and the relief thereby prayed for is refused as to all income received or collections of cash made by the Receiver prior to said December 19, 1914, which said last mentioned income and collections of cash are impounded and set apart as a fund for distribution to general creditors, as their claims have been hereinbefore allowed and decreed.

(b) The petitions of said Westinghouse Electric & Manufacturing Company and Hotpoint Electric Company are sustained as to income received and collections of cash made by the Receiver prior to December 19, 1914, and likewise as to all diversions to interest and sinking fund payments upon underlying mortgages, and as to all construction expenditures, made by the Receiver prior to December 19, 1914, which said interest, sinking fund and construction payments are charged against the said Trustee and the bondholders represented by it; and said petitions are otherwise denied.

Accordingly the Receiver is deemed to have on hand as income and collections of cash constituting a fund for the satisfaction of claims of general creditors, as hereinbefore decreed, of \$156,464.06, made up of the following items:

Cash on Hand.....	\$52,423.93
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Interest and Sinking Fund Payments	
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(exclusive Boise Railroad).....	77,233.73
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Construction Payments	
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(exclusive Boise Railroad).....	18,316.52
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Nothing herein contained shall be construed to

charge the said Guaranty Trust Co. or bondholders represented by it with interest or construction payments made on account of said Boise R. R. Co., the properties of which have been decreed not subject to the mortgage of the said Guaranty Trust Co., and have been segregated from the receivership estate.

Claims collected by Receiver prior to December 19, 1914, on account debts due

Railway Company .....\$48,682.72

Total charges against Receiver for

General Creditors' Fund .....\$196,936.80

Against which sum Receiver is credited on account of disbursements, other than ordinary expenses of operation and administration, with the following payments:

Discharged lien 1913 taxes...\$31,319.62

Payrolls for December, 1913,  
ordered paid by Court..... 3,621.50

Miscellaneous accounts payable ..... 137.31

Accidents and damages resulting from Receiver's operations ..... 3,350.00

Accidents and damage expense 254.05

Administration expenses, accounts, and settling estate 1,790.26

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Total Credits ..... \$ 40,472.74

Leaving a balance cash deemed to be on hand to apply on claims of general creditors \$156,464.06

which said last mentioned sum the Receiver is directed to disburse *pro rata* among the creditors whose claims are hereinbefore allowed and decreed, in the proportion that the said claims bear to the said cash deemed to be on hand, and there is accordingly declared and decreed a dividend of three and two-tenths (.032) cents on each dollar of the said foregoing claims.

In order to carry out the court's decision and decree herein that the interest and construction payments so made by the Receiver are to be deemed cash on hand, and the amount thereof charged against the bondholders for whose benefit said payments were deemed to have been made, it is *ordered* that the Receiver shall make distribution by distributing the full dividend decreed and allowed to the general creditors whose claims are not evidenced by bonds of defendant Railway Company secured by the said mortgage to the Guaranty Trust Company of New York, and that the balance remaining on hand after said full dividend shall be divided among the creditors whose claims are so evidenced by bonds.

8. It appearing from the books of the Receiver that there are various accounts receivable, irrigation district warrants, etc., which, if collected by him would be charges to income from the commencement of the receivership to the period ending December 19, 1914, during which said period the income is held to be a fund for the benefit of general creditors, and it appearing that the said items are doubtful of collection, and that the claims, other than for cash, are

of doubtful value if collected, and being made up of the following items, to-wit:

L. L. Gray.....	\$ 50.00
Nampa Iron Works .....	14.00
Owyhee Irrigation Power Company (pay- able in Gem Irrigation District Bonds)	67,000.00
Miscellaneous Consumer's Accts.....	502.34
W. T. Booth .....	1,000.00
Maryland Casualty Company .....	154.05
Northwestern Real Estate Company....	500.00
Gem Irrigation District Warrants.....	29,972.88

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Total Accounts Receivable.....\$99,193.27

it is *ordered* that the Receiver sell all said accounts receivable, irrigation district warrants, etc., to the highest bidder for cash.

Notice of said sale shall be given by publication once each week for two successive weeks in some newspaper published in Boise, Ada County, Idaho, and in another paper published in Caldwell, Canyon County, Idaho, and the sale shall be held not less than ten days after the last publication, at the front door of the Ada County Court House in Boise, Ada County, Idaho. The sale when made shall be reported to the Court for confirmation and upon confirmation thereof any amount realized from the sale of said accounts receivable, irrigation warrants, etc., shall be added to the dividend hereinafter declared and distributed among the General Creditors in the same proportion that the amounts of said claims bear



to the amount so received by the Receiver from said sale.

9. It further appearing that there are other accounts receivable, claims and demands which have accrued to said receiver subsequent to December 19, 1914, and which should be credited, if collected, to income subsequent to said date, and other claims, rights of action and demands which are not subject to claims of general creditors under the terms of this decree, and that by the decree of foreclosure in said Cause No. 517 and the Master's Deed executed and delivered to the purchaser, the Electric Investment Company, pursuant thereto, all such accounts receivable, claims or demands have been sold and conveyed to the purchaser, it is *ordered, adjudged and decreed* that the Receiver assign all such bills receivable, rights, claims and demands, being all bills receivable, rights, claims and demands of defendant Railway Company and its receiver other than those mentioned in the preceding paragraph, to the said purchaser, the Electric Investment Company, by appropriate written assignment to be submitted to and approved by the Court before delivery thereof.

10. It appearing from the report of Receiver that he has as cash on hand the sum of \$17,287.65, being the proceeds of the so-called Idaho-Oregon Equipment Trust collected by said Receiver (except the \$2500 heretofore decreed to the Westinghouse Electric and Manufacturing Company), and the further sum of \$27,371.28, being the proceeds of 107 Idaho-Oregon first and refunding mortgage bonds, likewise

collected by the Receiver, and the decree of foreclosure in said Cause No. 517 having specifically directed that the claims upon which said sums, and each thereof, were collected, and all judgments or rights arising out of the same, or cash proceeds thereof, should be sold to the purchaser, and the Master's Deed in said Cause No. 517 having purported to convey said rights, claims, moneys, etc., to the said purchaser, it is *ordered, adjudged and decreed* that the said Receiver pay over the said sums of money above mentioned aggregating the sum of \$44,658.93, to the said purchaser, Electric Investment Company.

11. There are pending against the Receiver, as shown by his report, the following suits and claims which have not been determined and which involve title to property in the hands of the Electric Investment Company, the purchaser at foreclosure sale, on some parts of said property.

Bill by Colonial Trust Company, wherein and whereby said Colonial Trust Company seeks to foreclose its mortgage upon certain properties of said Railway Company formerly belonging to Boise & Interurban Railway Company.

Suit by Slick Brothers Construction Company seeking to establish title to certain properties known as the Crane Falls Power Site, in Elmore and Owyhee Counties, Idaho.

The Electric Investment Company, the purchaser, is accordingly substituted as party defendant in the said suits and the said Receiver is discharged from each thereof, and all liability of the said Receiver

in the said suits or either thereof is transferred to said purchaser.

The Receiver has brought, and there are pending, the following claims to property or to realize upon assets belonging to said Idaho Railway, Light & Power Company:

Suit against John G. G. Kerry on note for \$50,000 with interest at 6% from April 22nd, 1913, pending in this court.

Suit against John. G. G. Kerry and Owyhee Irrigation Power Company for \$582,500.00 damages for breach of contract.

The said claims, and each thereof, are hereby transferred to the purchaser, Electric Investment Company, and said purchaser is directed to cause itself to be substituted as plaintiff in said suits forthwith and upon its failure so to do, the said suits may be dismissed on motion, subject, however, to the consummation of negotiations for settlement of said suits by the receiver prior to his discharge.

12. The Receiver is hereby directed to carry out the provisions of this decree and to conduct the sales and make the payments hereby prescribed, and thereupon report his action hereunder, together with a final statement of his accounts, to the court, and thereupon the court, without further notice, will discharge said Receiver, pursuant to the petition for discharge accompanying the Receiver's final account heretofore filed herein on, to-wit: July 24, 1915, and the Notice to the parties and to all persons having

claims against said Receiver given, and published in connection with the filing of said accounts.

Dated December 20, 1915.

FRANK S. DIETRICH,  
District Judge.

Endorsed: Filed Dec. 20, 1915. W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

In Equity—No. 468.

NOTICE TO JOIN IN APPEAL.

To American Steel and Wire Company, General Electric Company, Westinghouse Electric and Manufacturing Company, and Guaranty Trust Company of New York, Trustee, corporations, and E. H. Jennings, parties to the above entitled cause, and to Messrs. Wood & Driscoll, Hawley & Hawley, B. S. Crow, Wyman & Wyman, and Cavanah & Blake, their Attorneys:

*You, and each of you, are hereby notified* That the undersigned on or shortly after the 22d day of April, 1916, will apply to the Judge of the above entitled Court for the allowance of an appeal to review the final judgment and decree of said Court herein, and the undersigned hereby demand and request that you and each of you join with them in said application for appeal, on or before said 22d day of April, 1916; and if you fail or refuse to join in said appeal by said date, you are further notified that you will be deemed to have acquiesced in said judgment and decree, and the undersigned will prosecute their said



appeal as to their own interests and without your assistance and will apply to the Court for an order of severance as to your interests and each of them.

Dated this 12th day of April, 1916.

JOHN A. ROEBLING'S SONS COMPANY  
OF CALIFORNIA,

By BEVERLY L. HODGHEAD,  
Its Attorney, Residence: San  
Francisco, California.

I. P. MORRIS COMPANY,

By BEVERLY L. HODGHEAD,  
Its Attorney, Residence: San  
Francisco, California.

Endorsed: Filed April 22, 1916. W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

In Equity—No. 468.

PETITION FOR ALLOWANCE OF APPEAL  
AND ORDER FIXING BBOND WITH  
PRAYER FOR SEVERANCE.

The above named John A. Roebling's Sons Company of California, a corporation, intervener in the above entitled cause, conceiving itself aggrieved by the final order and decree of the above entitled Court made and entered by said Court in said cause on the 20th day of December, 1915, wherein and whereby it was ordered and adjudged that the bill of intervention of this petitioner, the John A. Roebling's Sons Company of California, be dismissed, and its claims to priority or preference in payment of its

said account of \$21,057.37 in the administration of the properties of said Idaho Railway Light & Power Company, defendant, for which a Receiver was appointed herein, from the income thereof or from the proceeds of the sale of said properties, was denied, hereby appeals from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors filed herewith, and prays that said appeal may be allowed and that citation be issued, as provided by law, and also that an order be made fixing the amount of bond which said petitioner and appellant herein shall give and furnish upon said appeal, and that a transcript of the record, including the papers and proceedings upon which said order and decree were made, duly authenticated, may be sent to said United States Circuit Court of Appeals under the rules of such Court in such cases made and provided.

The petitioner further says that the American Steel & Wire Company, a corporation, General Electric Company, a corporation, Westinghouse Electric & Manufacturing Company, a corporation, Guaranty Trust Company of New York, a corporation, trustee, intervening or preferential claimants, and E. H. Jennings, parties to the above entitled cause, and each of them, were duly notified to join with the undersigned to prosecute an appeal in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree rendered in said cause on the 20th day of December, 1915, or that they and each of them would be deemed to acquiesce in the said judgment and that

the undersigned will prosecute said appeal without joining them as a party or parties therein.

Dated: April 24th, 1916.

BEVERLY L. HODGHEAD,

Solicitor for Intervener and Appellant, John A.  
Roebling's Sons Company of California, a corporation.

Endorsed: Filed April 28, 1916.

W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

In Equity—No. 468.

ORDER ALLOWING APPEAL.

*Whereas* in the District Court of the United States, for the District of Idaho, Southern Division, on the 20th day of December, 1915, a decree was made and entered in the above entitled cause wherein and whereby it was ordered and adjudged that the bill of intervention of said John A. Roebling's Sons Company of California, intervener therein, be dismissed, and wherein and whereby said bill of intervention was dismissed, and the said claim of preference or priority in payment of the account of said John A. Roebling's Sons Company of California against said defendant, Idaho Railway Light & Power Company, for \$21,057.37 in the administration of the receivership of said company from the income of said properties or the proceeds of the sale thereof was denied, and

*Whereas* said John A. Roebling's Sons Company of California has on the 28th day of April, 1916, filed its petition for an allowance of an appeal from said

order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, together with an Assignment of Errors in and by which said petition it has prayed that an order be made fixing the amount of cost bond which it shall give and furnish on said appeal;

*Now, Therefore*, in consideration of the premises, and good cause appearing therefor, and on motion of Beverly L. Hodghead, Esq., its solicitor, *It is ordered* that said appeal be and the same is hereby permitted and allowed, in which said John A. Roebling's Sons Company of California, a corporation, and I. P. Morris Company, a corporation, whose appeal herein is allowed by separate order made herein, are appellants, and Idaho Railway Light & Power Company, defendant, O. G. F. Markhus, Receiver thereof, Guaranty Trust Company of New York, a corporation, Trustee, under the mortgage referred to in said decree, Electric Investment Company, purchaser at the foreclosure sale of said properties, as set forth in said decree, and the following preferential claimants, to-wit, American Steel & Wire Company, a corporation, General Electric Company, a corporation, and said Westinghouse Electric & Manufacturing Company, a corporation, whose claims for preference or priority in payment were by said decree denied in whole or in part, and who have refused to join in the said appeal and as to whom proper summons and severance has been made, are appellees;

*It is further ordered* that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings herein be forthwith transmitted to



said United States Circuit Court of Appeals for the Ninth Circuit.

*It is further ordered* that the bond for costs of said appeal be and the same is hereby fixed at the sum of \$200.00 with sufficient sureties, according to the provisions of the law and the rules and practice of this Court.

And it further appearing that the American Steel & Wire Company, a corporation, General Electric Company, a corporation, and Westinghouse Electric & Manufacturing Company, a corporation, Guaranty Trust Company of New York, a corporation, trustee, and E. H. Jennings, and each of them, were duly notified in writing to join with the said appellant to prosecute said appeal or they would be deemed to have acquiesced in the said decree, the said appellant would prosecute said appeal without joining them or either of them as a party or parties thereto.

And it further appearing that none of said parties above have appeared within the time prescribed by law and specified in said notice and demand, but has severed itself and themselves in their defense or in support of their claims in this Court in said cause, the said John A. Roebling's Sons Company of California is hereby granted its appeal as aforesaid, and its interests are severed in said appeal from all of the aforesaid parties and claimants herein.

Dated: April 28, 1916.

FRANK S. DIETRICH,  
District Judge.

Endorsed: Filed April 28, 1916. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity—No. 468.

ASSIGNMENT OF ERRORS.

Now comes the intervener and appellant, John A. Roebling's Sons Company of California, by its Solicitor, Beverly L. Hodghead, Esq., and having prayed for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree made and entered in said cause on the 20th day of December, 1915, files the following assignment of errors upon which it will rely upon the prosecution of its said appeal from said decree, and specifies the following particulars in which said decree is erroneous and unjust, to-wit:

(1) Said Court erred in denying and disallowing said claim of John A. Roebling's Sons Company of California as a preferred creditor of said Idaho Railway Light & Power Company, and over the claims of the general creditors of said Idaho Railway Light & Power Company and of the Guaranty Trust Company of New York, Trustee, and of the mortgage bondholders referred to in said decree;

(2) Said Court erred in refusing to direct the payment of said account of John A. Roebling's Sons Company of California for \$21,057.37 against said Idaho Railway Light & Power Company and the whole thereof from the income received by the Receiver of said Railway Company from the operation of said properties thereof described and referred to in said decree, and in denying and disallowing the said claim of said appellant for priority or preference in

payment thereof from said income, as prayed for in said Bill;

(3) That said Court erred in refusing to direct the payment of said account of appellant herein from the proceeds of the sale of said property by the Special Master under decree of foreclosure of mortgage in the action No. 517 instituted by the Guaranty Trust Company of New York, Trustee for the mortgage bondholders, as referred to in said decree herein, and in denying and disallowing said claim of appellant for priority and preference of payment from the proceeds of said sale over and above the claims of the said Guaranty Trust Company of New York, as trustee and plaintiff in said action;

(4) That said Court erred in ordering, adjudging and decreeing that the said claim of John A. Roebling's Sons Company of California, a corporation, appellant herein, was inferior and subordinate in right to the claims of the Guaranty Trust Company of New York under the decree in favor of said Trustee in said cause No. 517;

(5) That said Court erred in ordering, adjudging and decreeing that the said claim of appellant herein is not a lien against any of the property covered by said decree of foreclosure in said cause No. 517 and belonging to said Idaho Railway Light & Power Company, defendant herein, and in ordering, adjudging and decreeing that said property in the hands of the Electric Investment Company, the purchaser thereof at the foreclosure sale, is free from any lien and that said claim of appellant herein was only enforceable



to the extent that there were assets available for the payment thereof as prescribed in said decree, to-wit, to the extent of three and 22-100 cents (.0322) on each dollar of said claim.

(6) Said Court erred in holding, determining and adjudging that the claim of said John A. Roebling's Sons Company of California, the intervener, was not entitled to preference over the lien of the pre-existing mortgage or trust deed of the Guaranty Trust Company of New York because the material and supplies out of which said claim arose were not furnished or supplied within six months prior to the institution of the receivership in said above entitled cause.

(7) The Court erred in holding, determining and adjudging that the said claim of John A. Roebling's Sons Company of California, appellant herein, was not entitled to preference over the pre-existing mortgage or trust deed of the Guaranty Trust Company of New York because the material and supplies furnished by said intervener, out of which said claim arose, were furnished for new construction and not for repair or maintenance of the existing plant of said defendant Railway Company and in the ordinary operation and maintenance of said property.

(8) Said Court erred in ordering and adjudging by said decree that the income of said receivership received, and all collections of cash made by said Receiver subsequent to the date of the filing of said petition or bill of said Guaranty Trust Company of New York for the foreclosure of said mortgage on the 19th day of December, 1914, be impounded for



the benefit of said Guaranty Trust Company of New York and the bondholders represented by it, and adjudging that the right of said Guaranty Trust Company of New York, said Trustee, in and to said income and collections was superior to the rights and claims of appellant herein.

(9) Said Court erred in adjudging and decreeing that the balance of cash deemed to be on hand to apply on the claims of general creditors was \$156,464.06, and in refusing to add to said fund the income from said receivership after said 19th day of December, 1914.

*Wherefore* said John A. Roebling's Sons Company of California, said intervener and appellant, prays that said judgment and decree of said District Court of the United States, made and entered on the 20th day of December, 1915, in the making of which error is herein assigned, be reversed and that said District Court be directed to enter an order reversing the same, and ordering and adjudging that the claim of said John A. Roebling's Sons Company of California, appellant herein, for the sum of \$21,057.37 is entitled to preference and priority in payment from the income of said properties of said Idaho Railway Light & Power Company, the defendant in said action, and from the proceeds of the sale thereof over the lien of the mortgage or trust deed of said Guaranty Trust Company of New York, and over the claims of general creditors of said defendant Railway Company, and that the relief prayed for in said bill of intervention of intervener and appellant here-

in be granted, and for such other relief, orders and decrees as said intervener and appellant is entitled to in equity.

Dated this 24th day of April, 1916.

BEVERLY L. HODGHEAD,

Solicitor for said Intervener and Appellant.

Endorsed: Filed April 28, 1916. W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

In Equity—No. 468.

PETITION FOR ALLOWANCE OF APPEAL  
AND ORDER FIXING BOND WITH  
PRAYER FOR SEVERANCE.

The above named I. P. Morris Company, a corporation, cross-complainant in the above entitled cause, conceiving itself aggrieved by the final order and decree of the above entitled Court made and entered by said Court in said cause on the 20th day of December, 1915, wherein and whereby it was ordered and adjudged that the bill of intervention of this petitioner, the I. P. Morris Company, be dismissed, and its claim to priority or preference in payment of its said account of \$26,844.21 in the administration of the properties of said Idaho Railway Light & Power Company, defendant, for which a Receiver was appointed herein, from the income thereof or from the proceeds of the sale of said properties, was denied, hereby appeals from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors filed herewith, and prays that said

appeal may be allowed and that citation be issued, as provided by law, and also that an order be made fixing the amount of bond which said petitioner and appellant herein shall give and furnish upon said appeal, and that a transcript of the record, including the papers and proceedings upon which said order and decree were made, duly authenticated, may be sent to said United States Circuit Court of Appeals under the rules of such Court in such cases made and provided.

The petitioner further says that the American Steel & Wire Company, a corporation, General Electric Company, a corporation, Westinghouse Electric & Manufacutring Company, a corporation, Guaranty Trust Company of New York, a corporation, trustee, intervening or preferential claimants, and E. H. Jennings, parties to the above entitled cause, and each of them, were duly notified to join with the undersigned to prosecute an appeal in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree rendered in said cause on the 20th day of December, 1915, or that they and each of them would be deemed to acquiesce in the said judgment and that the undersigned will prosecute said appeal without joining them as a party or parties therein.

Dated: April 24th, 1916.

BEVERLY L. HODGHEAD,

Solicitor for Cross-complainant and Appellant,

I. P. Morris Company, a corporation.

Endorsed: Filed April 28, 1916. W. D. McReynolds, Clerk.



(Title of Court and Cause.)

In Equity—No. 468.

ORDER ALLOWING APPEAL.

*Whereas* in the District Court of the United States, for the District of Idaho, Southern Division, on the 20th day of December, 1915, a decree was made and entered in the above entitled cause wherein and whereby it was ordered and adjudged that the cross bill of said I. P. Morris Company, cross-complainant therein, be dismissed, and wherein and whereby said cross bill was dismissed, and the said claim of preference or priority in payment of the account of said I. P. Morris Company against said defendant, Idaho Railway Light & Power Company, for \$26,844.21 in the administration of the receivership of said company from the income of said properties or the proceeds of the sale thereof was denied, and

*Whereas* said I. P. Morris Company has on the 28th day of April, 1916, filed its petition for an allowance of an appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, together with an Assignment of Errors in and by which said petition it has prayed that an order be made fixing the amount of cost bond which it shall give and furnish on said appeal;

*Now, Therefore*, in consideration of the premises, and good cause appearing therefor, and on motion of Beverly L. Hodghead, Esq., its solicitor, *It is ordered* that said appeal be and the same is hereby permitted and allowed, in which said I. P. Morris Company, a corporation, John A. Roebling's Sons Com-



pany of California, a corporation, whose appeal herein is allowed by separate order made herein, are appellants, and Idaho Railway Light & Power Company, defendant, O. G. F. Markhus, Receiver thereof, Guaranty Trust Company of New York, a corporation, Trustee, under the mortgage referred to in said decree, Electric Investment Company, purchaser at the foreclosure sale of said properties, as set forth in said decree, and the following preferential claimants, to-wit, American Steel & Wire Company, a corporation, General Electric Company, a corporation, and said Westinghouse Electric & Manufacturing Company, a corporation, whose claims for preference or priority in payment were by said decree denied in whole or in part, and who have refused to join in the said appeal and as to whom proper summons and severance has been made, are appellees;

*It is further ordered* that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

*It is further ordered* that the bond for costs of said appeal be and the same is hereby fixed at the sum of \$200.00 with sufficient sureties, according to the provisions of the law and the rules and practice of this Court.

And it further appearing that the American Steel & Wire Company, a corporation, General Electric Company, a corporation, Westinghouse Electric &

Manufacturing Company, a corporation, Guaranty Trust Company of New York, a corporation, trustee, and E. H. Jennings, and each of them, were duly notified in writing to join with the said appellant to prosecute said appeal or they would be deemed to have acquiesced in the said decree, the said appellant would prosecute said appeal without joining them or either of them as a party or parties thereto,

And it further appearing that none of said parties above have appeared within the time prescribed by law and specified in said notice and demand, but has severed itself and themselves in their defence or in support of their claims in this Court in said cause, the said I. P. Morris Company is hereby granted its appeal as aforesaid, and its interests are severed in said appeal from all of the aforesaid parties and claimants herein.

Dated: April 28, 1916.

(Signed) FRANK S. DIETRICH,  
District Judge.

Endorsed: Filed April 28, 1916. W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

In Equity—No. 468.

ASSIGNMENT OF ERRORS.

Now comes the cross-complainant and appellant, I. P. Morris Company, by its solicitor, Beverly L. Hodghead, Esq., and having prayed for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree made and

entered in said cause on the 20th day of December, 1915, files the following assignment of errors upon which it will rely upon the prosecution of its said appeal from said decree, and specifies the following particulars in which said decree is erroneous and unjust, to-wit:

(1) Said Court erred in denying and disallowing said claim of I. P. Morris Company as a preferred creditor of said Idaho Railway Light & Power Company, and over the claims of the general creditors of said Idaho Railway Light & Power Company and of the Guaranty Trust Company of New York, Trustee, and of the mortgage bondholders referred to in said decree;

(2) Said Court erred in refusing to direct the payment of said account of I. P. Morris Company for \$26,844.21 against said Idaho Railway Light & Power Company and the whole thereof from the income received by the Receiver of said Railway Company from the operation of said properties thereof described and referred to in said decree, and in denying and disallowing the said claim of said appellant for priority or preference in payment thereof from said income, as prayed for in said Bill;

(3) That said Court erred in refusing to direct the payment of said account of appellant herein from the proceeds of the sale of said property by the Special Master under decree of foreclosure of mortgage in the action No. 517 instituted by the Guaranty Trust Company of New York, Trustee for the mortgage bondholders, as referred to in said decree herein,

and in denying and disallowing said claim of appellant for priority and preference of payment from the proceeds of said sale over and above the claims of the said Guaranty Trust Company of New York, as trustee and plaintiff in said action;

(4) That said Court erred in ordering, adjudging and decreeing that the said claim of I. P. Morris Company, a corporation, appellant herein, was inferior and subordinate in right to the claims of the Guaranty Trust Company of New York under the decree in favor of said Trustee in said cause No. 517;

(5) That said Court erred in ordering, adjudging and decreeing that the said claim of appellant herein is not a lien against any of the property covered by said decree of foreclosure in said cause No. 517 and belonging to said Idaho Railway Light & Power Company, defendant herein, and in ordering, adjudging and decreeing that said property in the hands of the Electric Investment Company, the purchaser thereof at the foreclosure sale, is free from any lien and that said claim of appellant herein was only enforceable to the extent that there were assets available for the payment thereof as prescribed in said decree, to-wit, to the extent of three and 22-100 cents (.0322) on each dollar of said claim;

(6) Said Court erred in holding, determining and adjudging that the claim of said I. P. Morris Company, the cross complainant, was not entitled to preference over the line of the pre-existing mortgage or trust deed of the Guaranty Trust Company of New York because the material and supplies out of which



said claim arose were not furnished or supplied within six months prior to the institution of the receivership in said above entitled cause.

(7) The Court erred in holding, determining and adjudging that the said claim of I. P. Morris Company, appellant herein, was not entitled to preference over the pre-existing mortgage or trust deed of the Guaranty Trust Company of New York because the material and supplies furnished by said cross-complainant, out of which said claim arose, were furnished for new construction and not for repair or maintenance of the existing plant of said defendant Railway Company and in the ordinary operation and maintenance of said property.

(8) Said Court erred in ordering and adjudging by said decree that the income of said receivership received, and all collections of cash made by said Receiver subsequent to the date of the filing of said petition or bill of said Guaranty Trust Company of New York for the foreclosure of said mortgage on the 19th day of December, 1914, be impounded for the benefit of said Guaranty Trust Company of New York and the bondholders represented by it, and adjudging that the right of said Guaranty Trust Company of New York, said Trustee, in and to said income and collections was superior to the rights and claims of appellant herein.

(9) Said Court erred in adjudging and decreeing that the balance of cash deemed to be on hand to apply on the claims of general creditors was \$156,464.06, and in refusing to add to said fund the income

from said receivership after the said 19th day of December, 1914.

*Wherefore* said I. P. Morris Company, said cross-complainant and appellant, prays that said judgment and decree of said District Court of the United States, made and entered on the 20th day of December, 1915, in the making of which error is herein assigned, be reversed and that said District Court be directed to enter an order reversing the same, and ordering and adjudging that the claim of said I. P. Morris Company, appellant herein, for the sum of \$26,844.21 is entitled to preference or priority in payment from the income of said properties of said Idaho Railway Light & Power Company, the defendant in said action, and from the proceeds of the sale thereof over the lien of the mortgage or trust deed of said Guaranty Trust Company of New York, and over the claims of general creditors of said defendant Railway Company, and that the relief prayed for in said cross-bill of cross-complainant and appellant herein be granted, and for such other relief, orders and decrees as said cross-complainant and appellant is entitled to in equity.

Dated: this 24th day of April, 1916.

BEVERLY L. HODGHEAD,  
Solicitor for said Cross-complainant and  
Appellant.

Endorsed: Filed April 28, 1916. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity—No. 468.

*Know All Men by These Presents:*

That the American Surety Company of New York, a corporation duly organized under the laws of the State of New York and duly qualified and authorized to do business and to become surety on bonds within the State of Idaho, acknowledges itself to be indebted to the Idaho Railway Light & Power Company, a corporation, O. G. F. Markhus, Receiver thereof, Guaranty Trust Company of New York, a corporation, Trustee, Electric Investment Company, a corporation, American Steel & Wire Company, a corporation, General Electric Company, a corporation, and Westinghouse Electric & Manufacturing Company, a corporation, in the sum of Two Hundred (\$200) Dollars, conditioned that whereas on the 20th day of December, 1915, in the District Court of the United States of the District of Idaho, Southern Division, in said above entitled action pending in that Court, wherein Westinghouse Electric & Manufacturing Company was plaintiff and the Idaho Railway Light & Power Company was defendant, and said John A. Roebling's Sons Company of California, a corporation, was intervener, a decree was rendered and entered against said John A. Roebling's Sons Company of California, a corporation, denying its claim of preference or priority in the payment of its account against said Idaho Railway Light & Power Company, and the said John A. Roebling's Sons Company of California having obtained an appeal to the United States Circuit Court of Appeals for the Ninth

Circuit, to reverse the said decree, and citation having been directed to said Idaho Railway Light & Power Company, a corporation, O. G. F. Markhus, Receiver thereof, Guaranty Trust Company of New York, a corporation, Trustee, Electric Investment Company, a corporation, American Steel & Wire Company, a corporation, General Electric Company, a corporation, and Westinghouse Electric & Manufacturing Company, a corporation, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, on the 29th day of May, 1916, to show cause why said decree rendered against said appellant should not be corrected,

*Now, Therefore,* if the said John A. Roebling's Sons Company of California, a corporation, shall prosecute its said appeal to effect and answer all costs, if it shall fail to make its plea good, then the above obligation will be void, otherwise to remain in full force and effect.

AMERICAN SURETY COMPANY OF  
NEW YORK,

By BRADLEY SHEPPARD,  
Resident Vice-President.

McKEEN F. MORROW,

(Seal.) Resident Assistant Secretary.

Approved as to form and sufficiency of surety  
this 29th day of April, 1916.

(Signed) FRANK S. DIETRICH,  
District Judge.

Endorsed: Filed April 29, 1916. W. D. McReynolds, Clerk.



(Title of Court and Cause.)

In Equity—No. 468.

*Know All Men by These Presents:*

That the American Surety Company of New York, a corporation duly organized under the laws of the State of New York and duly qualified and authorized to do business and to become surety on bonds within the State of Idaho, acknowledges itself to be indebted to the Idaho Railway Light & Power Company, a corporation, O. G. F. Markhus, Receiver thereof, Guaranty Trust Company of New York, a corporation, Trustee, Electric Investment Company, a corporation, American Steel & Wire Company, a corporation, General Electric Company, a corporation, and Westinghouse Electric & Manufacturing Company, a corporation in the sum of Two Hundred (\$200) Dollars, conditioned that whereas on the 20th day of December, 1915, in the District Court of the United States of the District of Idaho, Southern Division, in said above entitled action pending in that Court, wherein Westinghouse Electric & Manufacturing Company was plaintiff and the Idaho Railway Light & Power Company was defendant, and said I. P. Morris Company, a corporation, was cross-complainant, a decree was rendered and entered against said I. P. Morris Company, a corporation, denying its claim of preference or priority in the payment of its account against said Idaho Railway Light & Power Company, and the said I. P. Morris Company having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the said decree, and citation having been di-

rected to said Idaho Railway Light & Power Company, a corporation, O. G. F. Markhus, Receiver thereof, Guaranty Trust Company of New York, a corporation, Trustee, Electric Investment Company, a corporation, American Steel & Wire Company, a corporation, General Electric Company, a corporation, and Westinghouse Electric & Manufacturing Company, a corporation, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, on the 29th day of May, 1916, to show cause why said decree rendered against said appellant should not be corrected,

*Now, Therefore*, if the said I. P. Morris Company, a corporation, shall prosecute its said appeal to effect and answer all costs, if it shall fail to make its plea good, then the above obligation will be void, otherwise to remain in full force and effect.

AMERICAN SURETY COMPANY OF  
NEW YORK,

By BRADLEY SHEPPARD,  
Resident Vice-President.

McKEEN F. MORROW,  
Resident Assistant Secretary.

(Seal.)

Approved as to form and sufficiency of surety,  
this 29th day of April, 1916.

FRANK S. DIETRICH,  
District Judge.

Endorsed: Filed April 29, 1916. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity—No. 468.

PRAECIPE FOR RECORD.

*To the Clerk of the above entitled District Court:*

You will please issue, prepare and transcribe for the joint record on appeal herein by John A. Roebling's Sons Company of California, a corporation, intervener, and I. P. Morris Company, a corporation, cross-complainant, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under an appeal perfected to said Court in said suit by each of the foregoing appellants, and include in said transcript, copy of the following pleadings, exhibits, papers, opinion of the Court, final decree and statement of evidence, as herein set forth, to-wit:

(1) Original Bill of Complaint of Westinghouse Electric & Manufacturing Company, No. 468;

(2) Answer of defendant Idaho Railway Light & Power Company, No. 468;

(3) Order appointing Receiver;

(4) Bill of Intervention of John A. Roebling's Sons Company of California, a corporation, filed in Consolidated Actions, Nos. 468 and 470, omitting copy of account attached to said bill;

(5) Stipulation of Facts with respect thereto, filed in said Consolidated Actions;

(6) Cross Bill of I. P. Morris Company, a corporation, filed in said Consolidated Actions;

(7) Answer to said Cross Bill of said I. P. Morris Company, filed in said Consolidated Actions;

(7a) Stipulation of Facts on I. P. Morris cross bill;

(8) Stipulation of Facts concerning all preferential claimants, filed in said Consolidated Actions June 15th, 1914;

(9) Stipulation dated October 10th, 1914, regarding dismissal of Cause No. 470, and a determination of all petitions in Cause No. 468;

(10) Stipulation as to Record on Appeal, filed herein;

(11) Statement of Evidence;

(12) Memorandum Decision of the Court on Intervening Claims, dated April 26th, 1915;

(13) Final Decree, dated December 20, 1915;

(14) Summons and Notice to join in Appeal;

(15) Petition of John A. Roebling's Sons Company of California, for Appeal and Severance;

(16) Order allowing Appeal and Severance and fixing Bond of John A. Roebling's Sons Company of California;

(17) Assignment of Errors by John A. Roebling's Sons Company of California;

(18) Petition for Appeal by I. P. Morris, with Prayer for Severance;

(19) Order allowing Appeal and Severance, and fixing Bond of I. P. Morris Company;

(20) Assignment of Errors by I. P. Morris Company;

(21) Bond of John A. Roebling's Sons Company of California on Appeal;

(22) Bond of I. P. Morris Company on Appeal;



(23) Citation on Appeal;

(24) This Praeipce,

and all other papers which said appellants shall file herein in prosecution of or upon their said appeals.

Dated: May 1st, 1916.

BEVERLY L. HODGHEAD,

Solicitor for said Complainants and Appellants,  
John A. Roebling's Sons Company of California, a corporation, and I. P. Morris Company, a corporation.

State of Idaho,

County of Ada,—ss.

*McKeen F. Morrow*, being first duly sworn, deposes and says: That he is a citizen of the United State over the age of 21 years;

That he served the praecipe for record in the above entitled cause upon Messrs. Wyman & Wyman, solicitors for Guaranty Trust Company of New York, Trustee; Messrs. Hawley & Hawley, solicitors for General Electric Company, and Messrs. Wood & Driscoll, solicitors for American Steel and Wire Company on the 2nd day of May, 1916, by delivering copies of said praecipe to each of said firms of solicitors at their offices in Boise, Idaho;

That he served a copy of said praecipe on John F. McLane, solicitor for Idaho Railway, Light & Power Company, O. G. F. Markhus, Receiver of said company, and Electric Investment Company, by depositing a copy of said praecipe in the United States Post Office at Boise, Idaho, in an envelope addressed to said John F. McLane, care Utah Power & Light Com-

pany, Salt Lake City, Utah, with ordinary postage prepaid thereon on said 2nd day of May, 1916, and upon B. S. Crow, Esq., solicitor for Westinghouse Electric and Manufacturing Company, by depositing a copy of said praecipe in the United States Post Office at Boise, Idaho, in an envelope addressed to B. S. Crow, care O. S. L. Legal Department, Salt Lake City, Utah, with ordinary postage prepaid thereon on said 2nd day of May, 1916;

That the above addresses are the regular addresses of said solicitors last mentioned, and there is direct communication between the post office at Boise, Idaho, and the post office at Salt Lake City, Utah.

McKEEN F. MORROW.

*Subscribed and Sworn To* before me this 2nd day of May, 1916.

EDNA L. HICE,

Notary Public for Ada County, residing at  
Boise, Idaho.

(Seal.)

Endorsed: Filed May 2, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

In Equity—No. 468.

CITATION ON APPEAL.

United States of America,—ss.

*The President of the United States, Greeting:*

To Idaho Railway Light & Power Company, a corporation, O. G. F. Markhus, Receiver thereof,

Guaranty Trust Company of New York, a corporation, Trustee, Electric Investment Company, a corporation, American Steel & Wire Company, a corporation, General Electric Company, a corporation, and Westinghouse Electric & Manufacturing Company, a corporation:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, within thirty days from date hereof, to-wit, on the 29th day of May, 1916, pursuant to an order or orders allowing an appeal of record in the United States Court of the District of Idaho, Southern Division, taken and filed by John A. Roebling's Sons Company of California, a corporation, intervener, and I. P. Morris Company, a corporation, cross-complainant, wherein the said John A. Roebling's Sons Company of California, a corporation, and said I. P. Morris Company, a corporation, are appellants and you are appellees, to show cause, if any there be, why the decree rendered and entered against said appellants December 20th, 1915, as in said orders allowing said appeals mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

*Witness* the Honorable Frank S. Dietrich, United States District Judge for the District of Idaho, Southern Division, the 29th day of April, 1916.

FRANK S. DIETRICH,

Judge of the United States District Court.

Attest: W. D. McReynolds, Clerk.

(Seal)

Service of the above and foregoing citation and receipt of a copy thereof is hereby admitted this 29th day of April, 1916.

WYMAN & WYMAN,  
Solicitors for Guaranty Trust Co.

HAWLEY & HAWLEY,  
Solicitors for General Electric Co.

WOOD & DRISCOLL,  
Solicitors for American Steel and Wire Company.

Service of the above and foregoing citation and receipt of a copy thereof is hereby admitted this 1st day of May, 1916.

JOHN F. MacLANE,  
Solicitor for Idaho Railway Light and Power Company and O. G. F. Markhus, Receiver.

JOHN F. MacLANE,  
Solicitor for Electric Investment Company.

PERKY & CROW,  
B. S. CROW,  
Solicitors for Westinghouse Electric & Mfg Co.

Endorsed: Filed May 16, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

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### RETURN TO RECORD.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States



Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

W. D. McREYNOLDS,  
Clerk.

By PEARL E. ZANGER,  
Deputy.

ATTEST:

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(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript, consisting of pages 1 to 196, inclusive, to be full, true, and correct copies of the pleadings and proceedings in the above entitled cause in accordance with the praecipe on file herein, and that the same constitutes the transcript of record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$247.80, and that the same has been paid by the appellant.

Witness my hand and the seal of the said Court affixed at Boise, Idaho, this 8th day of June, 1916.

W. D. McREYNOLDS,  
Clerk.

By PEARL E. ZANGER,  
Deputy.

*In the District Court of the United States for the  
Southern District of Idaho, Southern Division.*

IN EQUITY—No. 470 (No. 468 Consolidated).  
GUARANTY TRUST COMPANY OF NEW  
YORK, Trustee,

Plaintiff,

vs.

IDAHO RAILWAY, LIGHT AND POWER COM-  
PANY, a Corporation, IDAHO TRACTION  
COMPANY, a Corporation, WESTING-  
HOUSE ELECTRIC AND MANUFACTUR-  
ING COMPANY, a Corporation, E. H. JEN-  
NINGS, I. P. MORRIS COMPANY, a Cor-  
poration,

Defendants,

AND

IN EQUITY—No. 468.

WESTINGHOUSE ELECTRIC AND MANUFAC-  
TURING COMPANY, a Corporation,

Plaintiff,

vs.

IDAHO RAILWAY, LIGHT AND POWER COM-  
PANY, a Corporation,

Defendant.

**Certified Copy of Answer of Guaranty Trust  
Company to Bill in Intervention, etc.**

To the Honorable the Judges of the District Court  
of the United States for the District of Idaho,  
Southern Division.

AND COMES NOW the plaintiff, Guaranty Trust

Company of New York, Trustee, a citizen and a corporation of the City of New York, and a resident of the City of New York, in the County of New York, and State of New York and now, and at all times hereafter, saving to itself all manner of benefit of exceptions or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the bill of intervention herein of John A. Roebling's Sons Company of California, and to all or some of the subject matter named and therein set forth, by way of answer to said bill of intervention or to so much thereof as this plaintiff is advised it is material and necessary for it to answer, and so answering respectfully shows to this Honorable Court as follows:

### I.

That this plaintiff has no knowledge, information, remembrance, or belief with respect to any of the matters set forth in that part of paragraph two of the said bill of intervention which is hereinafter denied, and on that ground and for that reason this plaintiff denies the said allegation that the said Idaho Railway, Light & Power Company received a large income, profit, and earnings from the operation of the roads and power plants described and referred to in said bill of intervention, but in that regard this plaintiff says it has no knowledge, information, remembrance or belief in respect to what income or profit or earnings said defendant may receive or may have received therefrom.

### II.

That this plaintiff has no knowledge, information,

remembrance or belief with respect to any of the matters set forth in paragraph six of said bill of intervention, and therefore and upon that ground it denies that the said intervenor has any interest in any of the property of said Idaho Railway, Light & Power Company whatsoever, and denies that it has any interest or claim in or to the proceeds of any part thereof; denies that in or about the months of March, April and May, 1913, or at any other time or at all, the said intervenor sold and delivered or sold or delivered to the said Idaho Railway, Light & Power Company any copper wire whatsoever; and denies that said defendant agreed to pay said intervenor the sum of \$38,577.17 or any other sum; and particularly denies that it sold copper wire in the quality or amount or at the times as set forth in the statement of said account attached to the said bill of intervention, or at all; that it has no knowledge that any sum whatever has been paid by said Idaho Railway, Light & Power Company to said intervenor on any account whatever and denies that any sum whatsoever is now due, owing or unpaid or due or owing or unpaid from said defendant to said intervenor.

### III.

That this plaintiff has no knowledge, information, remembrance, or belief with respect to any of the matters set forth in paragraph seven of said bill of intervention, and therefore this plaintiff denies that any debt of said defendant to said intervenor and particularly the said claim set forth in said bill of intervention should be preferred in order of pay-



ment or otherwise either out of the income of any of the property of said Idaho Railway, Light & Power Company or out of the proceeds of the sale thereof as against the claims of the mortgage bondholders and other creditors of said defendant or at all; and this plaintiff denies, on the ground hereinbefore stated that said merchandise, material and supplies or any merchandise, or material or supplies were sold by the intervenor to said defendant, and denies that the same consisted of copper wire to be used in the construction, maintenance and repair or construction or maintenance or repair of some or any of the electric or power transmission lines of said defendant Idaho Railway, Light & Power Company or at all; and denies that, at the time of said pretended sale or at any other time, said wire was necessary for the use of said defendant in the construction, alteration or repair of said or any power transmission line of the defendant or for any other purpose; and denies that said or any wire was actually used in the construction and repair or construction or repair or was actually used at all by this defendant, and denies that the same is still being used in the maintenance and operation or maintenance or operation of said or any electric or power transmission system of said defendant, or at all, and denies that all or any of the same is or at any time has been necessary for the continued maintenance and operation or operation or at all of the power transmission systems of said defendant or for any other purpose; and denies that the earnings of said or any property in the possession of said re-

ceiver are derived or have been derived from the use of any material sold by said intervenor to defendant, and denies that without such material said property could not have been operated or any earnings derived therefrom; and denies that all or any of said material and supplies or material or supplies were necessary for the use of the said Idaho Railway, Light & Power Company in keeping and preserving or in keeping or preserving the said or any mortgaged property, or any part thereof, in operative condition or any condition, or at all; and denies that the same was necessary to the maintenance and operation or maintenance or operation thereof; and denies that the said material and supplies or material or supplies did in anywise enhance the value of said property or add to the security of the bondholders thereof, and denies that said or any account of said intervenor for said material and supplies or material or supplies or at all was one of the current debts and expenses or current debts or expenses or were debts or expenses in anywise of the maintenance and operation or maintenance or operation of said property.

#### IV.

That this plaintiff has no knowledge, information, remembrance or belief with respect to any of the matters set forth in paragraph eight of said bill of intervention, and therefore and on that ground it denies that any material and supplies or material or supplies referred to in said bill of intervention were of such character as to entitled said intervenor, under the laws of the State of Idaho or at all, to

claim and assert or to claim or assert a mechanic's or any lien upon any of the property of the said defendant Idaho Railway, Light & Power Company; and denies that said intervenor did not file any lien upon said or any property for the reason that upon the request of the said Idaho Railway, Light & Power Company or by reason of any request or at all by an agreement made between said intervenor and said last named corporation to the effect that the said intervenor should and would or should or would refrain from filing and asserting or filing or asserting any lien upon the property of said Idaho Railway, Light & Power Company for the amount and value or the amount or value of said material and supplies or material or supplies or any materials or supplies or at all, that said Idaho Railway, Light & Power Company would and did or would or did waive the failure to file and assert or file or assert said lien and would treat and consider or would treat or consider the amount of said or of any claim for the value of said material and supplies or material or supplies or at all as a superior and preferred or a superior or preferred claim or any claim upon any property whatsoever to the same extent as if a lien were filed and asserted or filed or asserted under the laws of the State of Idaho, or at all, and in that respect denies that any agreement was made between said intervenor and said Idaho Railway, Light & Power Company whatsoever, with respect to the filing or the waiving of the filing of any lien; and denies that the said Idaho Railway, Light & Power Company, its officers and

agents, or that the said company or its officers or agents on any consideration whatsoever promised and agreed or promised or agreed to pay for said or any material and supplies or material or supplies at any time whatsoever or as a preferred claim out of the income and receipts or income or receipts of said corporation.

V.

That this plaintiff has no knowledge, information, remembrance or belief upon any of the matters set forth in paragraph nine of said bill of intervention, and therefore and on that ground it denies that large or any sum of money received by the said Idaho Railway, Light & Power Company from any source whatsoever or at any time whatsoever have been diverted from the funds of said corporation, but plaintiff admits that on or about the 30th day of May, 1913, the said Idaho Railway, Light & Power Company paid interest upon the mortgage bonds held by this plaintiff in the sum of \$165,750.00, but denies that the said sum of money so paid as interest upon said bonds or any part thereof whatsoever should have been used and applied or used or applied by said Railway Company or at all for any other purpose whatsoever that as hereinbefore specifically admitted, it was used and applied, and in particular this plaintiff denies that any part of said sum should have been used and applied or used or applied by said Idaho Railway, Light & Power Company to pay its expenses for maintenance and operation and repair, or maintenance or operation or repair of any of its properties or to pay any part of



the demand of the said intervenor herein; and denies that any income and revenue or income or revenue derived from the operation of said properties or any part thereof has been paid to this plaintiff as trustee or otherwise on account of said bonded indebtedness or at all.

## VI.

That this plaintiff has no knowledge, information, remembrance or belief with respect to any of the matters set forth in paragraph ten of said bill of intervention, and therefore and on that ground it denies that if the said properties, estates, premises, rights, contracts, privileges, equipment and franchises described in the bill of complaint of this plaintiff be declared subject to the lien of mortgage of the plaintiff and the same be foreclosed and sold by decree of this court as prayed for in the said complaint, the same cannot be sold for a sum sufficient to discharge and repay the mortgage bond indebtedness claimed and alleged by this plaintiff to be due and payable under said mortgage, and denies that said intervenor is without adequate remedy at law.

WHEREFORE, this plaintiff having fully answered all the matters in said bill in intervention which is material to be answered, prays the Court that the said bill of intervention be dismissed, and that the said intervenor be decreed to be without right to or interest in any part of the said property described in this plaintiff's amended bill of complaint herein, and that this plaintiff have its costs herein against the said intervenor, and such other

and further relief as may be just and equitable.

GUARANTY TRUST COMPANY,  
Trustee.

WYMAN & WYMAN,  
Solicitors for Plaintiff Guaranty Trust Company of  
New York, Trustee.

FRANK T. WYMAN,

Counsel for the Plaintiff Guaranty Trust  
Company of New York, Trustee.

Service admitted this 4th day of April, 1914.

BEVERLY A. HODGHEAD,  
RICHARDS & HAGA,  
McKEEN F. MORROW,

Solicitors for John A. Roebling's Sons Company.

UNITED STATES OF AMERICA.

District of Idaho,—ss.

I, W. D. McReynolds, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing copy of the Answer of Guaranty Trust Company to Bill in Intervention of the John A. Roebling's Sons, filed April 4, 1914, in consolidated causes Nos. 470 and 468, has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original, as the same appears of record and on file at my office and in my custody, and that the cost of said transcript amounts to the sum of \$4.40, which has been paid by the appellants John A. Roebling's Sons.

In testimony whereof, I have set my hand and

206     *John A. Roebling's Sons Co., et al., vs.*

affixed the seal of said court in said district this 22d day of July, 1916.

[Seal]

W. D. McREYNOLDS,

Clerk.

By \_\_\_\_\_,

Deputy.

[Ten Cent Internal Revenue Stamp. Canceled July 22, 1916. W. D. M.]

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[Endorsed]: Nos. 470-468. In the District Court of the United States of the *Southern* District of Idaho, Southern Division. Guaranty Trust Company of New York, Trustee, Plaintiff, vs. Idaho Railway, Light & Power Company, a Corporation, Idaho Traction Company, a Corporation, Westinghouse Electric and Manufacturing Company, a Corporation, E. H. Jennings, I. P. Morris Company, a Corporation, and Westinghouse Electric and Manufacturing Company, a Corporation, Plaintiff, vs. Idaho Railway, Light & Power Company, a Corporation, Defendant. In Equity—No. 470 (No. 468 Consolidated). Answer. Filed April 4, 1914. A. L. Richardson, Clerk.

No. 2813. United States Circuit Court of Appeals for the Ninth Circuit. Certified Copy of Answer of Guaranty Trust Company to Bill in Intervention, etc. Filed Jul. 28, 1916. F. D. Monekton, Clerk.

IN THE  
**United States Circuit Court of Appeals**  
IN AND  
FOR THE NINTH CIRCUIT

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JOHN A. ROEBLING'S SONS COM-  
PANY OF CALIFORNIA and I. P.  
MORRIS COMPANY,

*Appellants,*

vs.

IDAHO RAILWAY LIGHT &  
POWER COMPANY, O. G. F.  
MARKHUS, Receiver of said Com-  
pany, GUARANTY TRUST COM-  
PANY, Trustee, ELECTRIC IN-  
VESTMENT COMPANY, AMERI-  
CAN STEEL AND WIRE COM-  
PANY, GENERAL ELECTRIC  
COMPANY and WESTINGHOUSE  
ELECTRIC AND MANUFAC-  
TURING COMPANY,

*Appellees.*

No. 2813

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**APPELLANTS' OPENING BRIEF.**

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BEVERLY L. HODGHEAD,  
Attorney and Solicitor for Appellants.

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Filed this.....day of September, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

**Filed**  
The James H. Papp Co.,  
San Francisco  
SEP 19 1916

**F. D. Monckton,**  
Clerk.





IN THE  
**United States Circuit Court of Appeals**  
IN AND  
FOR THE NINTH CIRCUIT

---

JOHN A. ROEBLING'S SONS COM-  
PANY OF CALIFORNIA and I. P.  
MORRIS COMPANY,

*Appellants,*

vs.

IDAHO RAILWAY LIGHT &  
POWER COMPANY, O. G. F.  
MARKHUS, Receiver of said Com-  
pany, GUARANTY TRUST COM-  
PANY, Trustee, ELECTRIC IN-  
VESTMENT COMPANY, AMERI-  
CAN STEEL AND WIRE COM-  
PANY, GENERAL ELECTRIC  
COMPANY and WESTINGHOUSE  
ELECTRIC AND MANUFAC-  
TURING COMPANY,

*Appellees.*

No. 2813

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**APPELLANTS' OPENING BRIEF.**

## STATEMENT OF THE CASE.

This is an appeal from a decree of the District Court of the United States for the Southern District of Idaho, Southern Division, denying certain claims of preference asserted by appellants herein for material and supplies furnished to the appellee, the Idaho Railway Light & Power Company, within a reasonable time before the appointment of Receiver for that corporation. On December 23d, 1913, the Westinghouse Electric & Manufacturing Company, a corporation, a creditor of the railway company, filed in said Court a bill of complaint praying that a receiver be appointed. The railway company, the defendant, on the same day, filed its answer expressly admitting all the allegations of the bill, and "*prays that the Court may appoint a receiver as prayed for in plaintiff's complaint.*" The answer was signed by O. G. F. Markhus, general manager of the railway company. On the same day, and upon filing the answer, an order was entered appointing said O. G. F. Markhus, general manager of the company, Receiver thereof. The bill of complaint, the terms of which were admitted by the answer, alleged in substance that the Idaho Railway Light & Power Company was a corporation having a large capital stock, of which \$16,000,000 thereof was outstanding; that it had created a bonded indebtedness of \$30,000,000 secured by mortgage, of which \$7,255,000 had been issued and

was outstanding; that the company had acquired from various corporations many railroad properties and hydro-electric power plants and transmission and distribution lines, and had consolidated such power and traction properties with all extensions thereof into single systems respectively, and "that said traction " properties are likewise operated as a single and in- " terdependent system and the properties heretofore " belonging to different companies have been unified, " not only in control and management but in physical " connections and extensions, so that what were for- " merly three separate operating companies and " properties are now in fact one, and the lines of de- " marcation between them have been obliterated" (Tr., p. 12); that by this interdependent and unified system, the defendant railway company supplied transportation, light and power to a large territory, and many cities and towns in the counties of southwestern Idaho.

After the appointment of Receiver, and on the 14th day of January, 1914, the Guaranty Trust Company of New York, Trustee, began suit in the same Court to foreclose the mortgage, securing an authorized issue of \$30,000,000 of bonds, of which \$8,449,000 were outstanding. This latter suit was docketed as No. 470 of said Court; the proceeding for appointment of Receiver was docketed as No. 468. On January 19, 1914, the two causes were consolidated by order of Court under the number and title of said cause No. 470, and



the receivership extended to embrace the foreclosure proceeding.

Said bill of foreclosure set forth in detail the corporate capacity of the parties to the action, the jurisdiction of the Court, the execution of the mortgage to secure the payment of \$9,095,000 of bonds, the conditions of the mortgage, the breach of the covenants, the minute and detailed description of the properties grouped generally under various classifications, which are set out in the transcript at pages 95 to 99; and further concerning said properties alleged as follows (Tr., pp. 99 and 100):

*“that said properties, real and personal, constitute a single, indivisible Hydro-electric power system, including stations, substations, transmission and distribution lines, and a single, indivisible electric street and interurban railway system, with properties appurtenant to, and used in connection with, said power and railway properties.”*

The bill of intervention of appellant John A. Roebeling's Sons Company of California, and the cross bill of appellant I. P. Morris Company, for priority or preference over claims of the mortgage creditor, were thereafter filed in said consolidated causes and issue joined thereon. Trial was had and while said claims were under submission, the Court, on December 17, 1914, made an order dismissing without prejudice the said suit to foreclose the mortgage, it having determined that the period of grace allowed by the terms

of the mortgage, after default in the payment of interest, had not expired when the bill was filed, and that the action was therefore premature. Prior to such dismissal, all the parties concerned in the consolidated actions entered into a stipulation, confirmed by the Court's order of dismissal, "that claims to preference " heretofore made by intervention or otherwise, and " all proceedings had thereunder shall not be prejudiced by such dismissal" (Tr., p. 100). Immediately following the order of dismissal, the Guaranty Trust Company of New York, on December 17, 1914, filed a new bill of foreclosure in substantially the same form as that which was dismissed and covering the same property, and containing the same allegations, but alleging other defaults subsequently accruing. This cause was docketed as No. 517 but was never consolidated with No. 468.

Prior to the decree of the Court on the claims of preference herein involved, a decree of foreclosure and sale was entered in the action No. 517 on April 19, 1915, adjudging that the outstanding bonds secured by mortgage on which default had been made, were of the accrued value of \$8,449,000, and sale of the properties by the Special Master appointed for the purpose followed on June 21, 1915. It was provided in said decree of foreclosure and sale (Tr., p. 107) that "the said lien of plaintiff and any sale hereunder " and the proceeds thereof, as hereinafter provided " are . . . also subject to all claims and demands

“which may be awarded priority to the claim of the plaintiff herein, against said Receiver, and said estate, in said Cause No. 468, or in any said suits against said Receiver, as the same may have been or may hereafter be adjudged and determined either by this Court, or any Court in which said suits may lawfully be pending, or upon any appeal, lawfully taken from any decree of this Court in said Cause No. 468, or of this Court or any other Court in said plenary or independent suits”; and referring in terms to the intervening claims of appellants herein.

Thereafter on the 20th day of December, 1915, the Court entered its final decree in Cause No. 468, denying the claims of preference of appellants, from which decree this appeal is taken.

CLAIM OF APPELLANT JOHN A. ROEBLING'S SONS  
COMPANY OF CALIFORNIA.

John A. Roebling's Sons Company of California, a corporation, on March 25, 1915, filed in the above cause its bill of intervention setting forth its claim for preference in the distribution of the income, or proceeds of sale of the mortgaged properties. Said bill alleged in substance the corporate capacity of the parties to the proceeding, that the railway company was the owner of various systems of urban and inter-urban railways and power plants, transmission and distribution lines and properties which have heretofore been referred to, the appointment of a receiver,

the filing of the bill of foreclosure, and its statement of account against the said railway company for a balance due, with interest, of \$22,003.63, for materials and supplies sold and delivered to said railway company, and alleging as the basis of its claim for preference as follows (Tr., pp. 34 and 35):

“That the said merchandise and material and supplies sold by intervenor to said defendant, as herein alleged, consisted of copper wire to be used in the construction, maintenance and repair of some of the electric or power transmission lines of said defendant, above referred to, and at the time of the sale thereof the said wire was necessary for use of said defendant in the construction, alteration or repair of said power transmission lines of said defendant and that said wire was actually used in the construction and repair, and is still being used in the maintenance and operation of said electric or power transmission systems of said defendant and all of the same is, and at all times since the sale thereof was, necessary to the continued maintenance and operation of the power transmission systems of the defendant, and the earnings of said property in the possession of said Receiver or the portion thereof in the construction of which the material herein referred to was used, are derived from the use of said material so sold to defendant, as herein alleged, and without which said properties could not be operated or any earnings derived therefrom.

“That all of said material and supplies sold, furnished and delivered to said Idaho Railway



Light and Power Company, as herein alleged, were necessary for the use of said corporation in keeping and preserving the said mortgaged property, or some part thereof, in operative condition and were necessary to the maintenance and operation thereof, and said material and supplies did thereby enhance the value of said property and added to the security of the bondholders thereof and said account of said intervenor for said material and supplies was one of the current debts and expenses of the maintenance and operation of said property."

*Said bill of intervention further charged, and was chiefly based upon the claim, that a large amount of income received and earned during the time said material and supplies were being furnished and much greater than sufficient to pay all claims of preference asserted herein, were, before it became subject to the lien of the mortgage, diverted for the payment of interest on the said bonded indebtedness of the railway company; and that but for such wrongful diversion the accounts of appellants herein would have been paid from such earnings, as was intended by the parties at the time the material was furnished (Tr., par. IX, pp. 36 and 37).*

The material allegations of the intervener's bill were denied by the Guaranty Trust Company, for lack of information, but the railway company and its Receiver entered into a stipulation of facts with intervener with

reference to the allegations of the bill. The Guaranty Trust Company did not join in this stipulation, but the Receiver was called as a witness in the case and testified that all the facts set forth in the Stipulation of Facts were true, and neither this nor his further testimony in the case was contradicted. "The principal facts are incorporated in a written stipulation to which is added the uncontradicted testimony of the Receiver" (Decision of Court, Tr., p. 135).

The allegations hereinbefore quoted from the bill for the appointment of Receiver regarding the consolidation and unification of all of the properties of the railway company into a single interdependent system for purposes of operation were found by the Court to be true (Tr., p. 149).

#### THE ADMITTED FACTS.

From the Agreed Statement of Facts, the findings of the Court and the uncontradicted evidence of the Receiver, the following facts are in substance established.

That the Railway Company was engaged in the maintenance and operation of street railways, inter-urban electric lines and power and lighting plants, and at the time of the purchase of the material and supplies described in the intervener's claim, it was deriving a large income, profit and earnings from the operation of said roads and plants. Between the 18th of March and 30th of May, 1913,

the intervener sold and delivered to the Railway Company, which was then a going concern, the material and supplies mentioned in its bill, on the open current account of the Railway Company in the belief and with the intention on its part *that the same should be paid out of the current operating income*. It was agreed between the parties that the sale was to be a cash transaction within ordinary commercial usage and the agreed price should be so paid on bills rendered within thirty days from delivery. The claim was payable on or before June 1st, 1913. The total amount of the claim was \$38,577.17, on which the sum of \$17,519.80 only was paid, leaving a balance due in the sum of \$21,057.37, together with \$946.26 in interest. *On the 1st day of June the Railway Company took \$115,550 from the current funds of the company wholly derived from earnings and available for paying intervener's claim and paid interest upon the bonds held by plaintiff herein, and on the underlying bonds of the Boise & Interurban Railway Company and of the Boise Railroad. The total amount of interest paid on the various bonds, as shown by the stipulation, is as follows (Agreed Statement of Facts, pages 43-44) :*

Interest paid June 1st, 1913, on	
Bonds held by the Guaranty Trust Co.,	\$165,750
Bonds of Boise & Interurban Railway Co.,	26,825
Bonds of Boise Railroad,	9,725

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Total interest paid,	\$202,300
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The above total of interest paid was derived from the following sources:

Earnings of the Idaho Railway Co.,	\$115,550
From sale of bonds,	56,750
Note of Kissel, Kinnicutt & Co.,	30,000

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Total	\$202,300
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The following sums derived from earnings intended for payment of appellants' claims were diverted on June 1st, 1913, and paid as interest on bonds held chiefly by the Guaranty Trust Company (Tr., p. 44).

Paid on bonds of Guaranty Trust Co.,	\$79,000
Paid on bonds of Boise & Interurban Ry. Co.	26,825
Paid on bonds of Boise Railroad Co.	9,725

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Total interest paid from earnings,	\$115,550
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It further appears that at the time the material and supplies were furnished, the Railway Company was engaged in the extension of its lines, and to meet the demands for its service, was constructing



an additional transmission line from its central station at Swan Falls to the pumping plant of the Gem Irrigation District, a distance of about thirty miles, with a branch extension of four miles to the Guffey pumping station. Prior to this time the Railway Company had transmission lines extending from its generating plant to various cities and mining districts in Canyon, Ada and Owyhee counties, Idaho. During the fall of 1912 and the winter of 1913, it was enlarging the capacity of its Swan Falls plant. The transmission line to the Gem District "was constructed from Swan Falls Station for *the purpose of serving irrigation customers with whom contracts had been made,* ". . . with a view to utilizing the increased capacity of the Swan Falls Central Station as "thus enlarged."

At the same time the Railway Company was likewise interested in the properties of the Idaho-Oregon Light & Power Company and consequently in the development of the business of that company. The Idaho-Oregon Company had made various service contracts, largely for irrigation, involving the construction of a number of extensions, varying from one to six miles in length, "*and being of the character of ordinary service extensions*" such as any power company engaged in the conduct of its business as a public service corporation would be expected and required to make

“from year to year as its territory developed.” Some of the material purchased from intervener by the Railway Company was, for the above reason, furnished to the Idaho-Oregon Company under the agreement called an “equipment trust.”

All of the material and supplies so furnished by intervener were used and devoted to the purposes set forth in the agreed statement of facts which may be epitomized as follows:

General extension service,	\$1121.15
Swan Falls installation,	91.82
“Equipment Trust Agreement,”	10546.64
Transmission line to Gem District,	26817.56
	<hr/>
Total	38577.17
Paid	17519.80
	<hr/>
Balance	21057.37
Interest	946.26
	<hr/>
Total	22003.63

The agreement statement contains the following:

“It is further stipulated that all of said wire has been actually delivered by the intervener to the Railway Company and devoted by the Railway Company to the purposes above specified and is in use by the Railway Company (or by the Idaho-Oregon Company under said ‘Equipment trust

agreement'), as a part of its existing system, and has become a part of the Railway Company's system, has enlarged the same, and has contributed to the earnings, and to the value of the properties, and the security of the bonds, and said material is and was necessary to the continued maintenance and operation of the respective parts of said property for which the same was supplied and in which it is used."

It is admitted by the complaint of bondholders in foreclosure herein, at page 78, paragraph ninth, as follows, referring to all of the properties of said Railway Company as described therein:

"That said properties, real and personal, constitute a single indivisible hydro-electric power system, including stations, sub-stations, transmission and distribution lines, and a single indivisible electric street and interurban railway system with properties appurtenant to and used in connection with said power and railway properties."

It appears also from the statement of evidence in the case that the bonds under foreclosure in this case were owned in most part by a syndicate of bankers in New York managed by the firm of Kissell, Kinnicutt & Company (Tr., p. 129). Mr. Samuel L. Fuller, connected with that firm, is the head of the syndicate, and was also the Managing Director of the Idaho Railway Light & Power Company itself (Tr., p. 118). The Receiver, who was the local manager of the com-

pany, testified concerning the Roebling claim, "We  
 "were under obligations to furnish power to the Gem  
 "District. That is why we rushed the order, or  
 "rather, were in haste to get the material for build-  
 "ing that line. The order was placed here. *I don't*  
 "*recall who instructed me to give the order, but we*  
 "*got instructions from New York*" (Tr., p. 118).

CLAIM OF I. P. MORRIS COMPANY, APPELLANT.

The cross bill of appellant I. P. Morris Company in the nature of an intervening petition, contained preliminary allegations similar to the Roebling Bill, and alleged that pursuant to a contract made in 1912, the Morris Company did within six months prior to the appointment of Receiver, furnish material and perform labor in connection with its installation required in the operation of the Swan Falls Power Plant for the generation of electric energy upon which open account there was a balance due and unpaid of \$27,-023.31. Notes had subsequently been taken as evidence of indebtedness but not received in payment. Its claim for the equitable preference for the above amount is asserted in paragraphs IV and V of the bill as follows:

IV.

"That the machinery so furnished by this cross-complainant was used by the said Railway Company in the construction, maintenance and repair of its hydro-electric power plant, situated at Swan



Falls on Snake River in Owyhee County, Idaho, and the labor so done and performed by this cross-complainant in connection with the installation of said machinery was in connection with the repair of said hydro-electric power plant; that such machinery and labor was necessary for the use of said Railway Company in the construction, operation, maintenance and repair of said plant, and ever since the installation of said machinery and for several months last past the same has been used by said Railway Company and is now being used by the Receiver thereof for generating electric current furnished by the Railway Company and by said Receiver to the public and to the communities served by said Railway Company and its Receiver for operating the electric railway lines and cars owned and operated by said Railway Company.

"That without such machinery and labor so furnished and rendered by this cross-complainant, the Railway Company and its said Receiver would be unable to furnish electric power to its customers and to the communities served by such Company for heating, lighting, or other purposes, or for the operation of its railroad, city and interurban lines, or for discharging its duties as a public service corporation; and such Railway Company and its Receiver would be unable to maintain and protect the franchises held and enjoyed and described in the amended complaint of the Guaranty Trust Company of New York, Trustee, in its suit for the foreclosure of its mortgage or deed of trust."

## V.

“That the earnings of the Railway Company ever since the installation of said machinery, and the income and earnings of the property now in the possession of said Receiver, are largely, if not entirely, derived from the use and operation of the machinery so furnished and installed by this cross-complainant; and such machinery and the labor performed by the cross-complainant have greatly enhanced the value of the property of said Railway Company and the estate in the possession of said Receiver. That the income and earnings of the Railway Company and of said Receiver from the machinery so furnished and from the labor so performed by this cross-complainant, have been diverted and used for the payment of interest on the bonds issued by the Railway Company under the mortgage or deed of trust sought to be foreclosed by the Guaranty Trust Company of New York, Trustee, as aforesaid. That the earnings from such property aggregate a sum largely in excess of the amount due this cross-complainant, and if the same had been applied to the payment of this cross-complainant's account, as it should in equity and good conscience have been applied, it would long since have fully discharged and satisfied the claims of this cross-complainant, as aforesaid; but the earnings of such property, due to the furnishing of such machinery and the performance of such labor by this cross-complainant, have been diverted and used for other purposes, and particularly for the payment of interest on the bonds secured by the mortgage

sought to be foreclosed by said Guaranty Trust Company of New York, and the amount so diverted and misapplied to the payment of such interest is largely in excess of the amount due this cross-complainant."

The material parts of this cross bill were denied by the Guaranty Trust Company for lack of information, but appellant and the Receiver likewise entered into an Agreed Statement of Facts, from which it substantially appears as follows:

That the account, for which claim of preference is sought, is correct; that the machinery supplied was used by the Railway Company in improving, enlarging and in part rebuilding the Swan Falls Power Plant "by removing three 300 K. W. generating units, replacing the same by two 1250 K. W. generating units, with the necessary foundation, wheel pits, gates, and tail races all so arranged and placed that two additional 1250 K. W. can be installed in the future . . . . That the enlargement and improvement made at the Swan Falls plant under the Morris contract was for the purpose of putting the Railway Company in a condition to better serve its customers and to supply the increasing demand for electric current for the purposes stated."

That the material was received by the Railway Company prior to the 1st day of June, 1913, but the installation was not completed or accepted until within six months of the appointment of Receiver.

Substantially the same admission is made regarding the diversion of earnings for the payment of interest on bonds as is found in the Roebbling stipulation, and the Agreed Statement of Facts further contains the following admission (Tr., p. 72):

“(k) It is agreed that the machinery furnished to the Railway Company is worth the price thereof and that it has become a part of the corporate properties and assets of the Railway Company, and has added to the security of the plaintiff’s mortgage by an amount equal to such cost and value, and that such machinery is necessary to the continued operation of the Railway Company’s system, and that without it it could not perform its duties to the public; and that said material was furnished and work performed by Morris for the Railway Company in the belief and intention that the same, unless otherwise provided for by the Railway Company, would be paid for out of the operating or current income thereof.”

The Court by its final decree denied preference upon both claims, adhering strictly to the so-called “six-months’ rule” in the Roebbling case and holding that the material supplied under both claims was not for necessary maintenance and operating expenses but was chargeable to construction.

*The principal assignment of error and the chief reliance for reversal of the decree are based upon the wrongful diversion of the income, and the fact that considering the extensive and comprehensive sys-*



*tem of properties owned and operated by the Railway Company, the value of its plant and the amount and value of its securities, the work done was nothing more than ordinary service extensions and improvements and repairs, and properly chargeable to maintenance and operation. The claimants appealed to this Court and assigned, and now assign, as error the following:*

ASSIGNMENTS OF ERROR ON JOHN A. ROEBLING'S SONS  
COMPANY'S APPEAL.

I.

Said Court erred in denying and disallowing said claim of John A. Roebling's Sons Company of California as a preferred creditor of said Idaho Railway Light & Power Company, and over the claims of the general creditors of said Idaho Railway Light & Power Company and of the Guaranty Trust Company of New York, Trustee, and of the mortgage bondholders referred to in said decree:

II.

Said Court erred in refusing to direct the payment of said account of John A. Roebling's Sons Company of California for \$21,057.37 against said Idaho Railway Light & Power Company and the whole thereof from the income received by the Receiver of said Railway Company from the operation of said properties thereof described and referred to in said decree,

and in denying and disallowing the said claim of said appellant for priority or preference in payment thereof from said income, as prayed for in said Bill:

### III.

That said Court erred in refusing to direct the payment of said account of appellant herein from the proceeds of the sale of said property by the Special Master under decree of foreclosure of mortgage in the action No. 517 instituted by the Guaranty Trust Company of New York, Trustee for the mortgage bondholders, as referred to in said decree herein, and in denying and disallowing said claim of appellant for priority and preference of payment from the proceeds of said sale over and above the claims of the said Guaranty Trust Company of New York, as trustee and plaintiff in said action;

### IV.

That said Court erred in ordering, adjudging and decreeing that said claim of John A. Roebling's Sons Company of California, a corporation, appellant herein, was inferior and subordinate in right to the claims of the Guaranty Trust Company of New York under the decree in favor of said Trustee in said cause No. 517;

## V.

That said Court erred in ordering, adjudging and decreeing that the said claim of appellant herein is not a lien against any of the property covered by said decree of foreclosure in said cause No. 517 and belonging to said Idaho Railway Light & Power Company, defendant herein, and in ordering, adjudging and decreeing that said property in the hands of the Electric Investment Company, the purchaser thereof at the foreclosure sale, is free from any lien and that said claim of appellant herein was only enforceable to the extent that there were assets available for the payment thereof as prescribed in said decree, to wit, to the extent of three and 22-100 cents (.0322) on each dollar of said claim.

## VI.

Said Court erred in holding, determining and adjudging that the claim of said John A. Roebling's Sons Company of California, the intervener, was not entitled to preference over the lien of the pre-existing mortgage or trust deed of the Guaranty Trust Company of New York because the material and supplies out of which said claim arose were not furnished or supplied within six months prior to the institution of the receivership in said above entitled cause.

## VII.

The Court erred in holding, determining and adjudging that the said claim of John A. Roebling's Sons Company of California, appellant herein, was not entitled to preference over the pre-existing mortgage or trust deed of the Guaranty Trust Company of New York because the material and supplies furnished by said intervener, out of which said claim arose, were furnished for new construction and not for repair or maintenance of the existing plant of said defendant Railway Company and in the ordinary operation and maintenance of said property.

## VIII.

Said Court erred in ordering and adjudging by said decree that the income of said receivership received, and all collections of cash made by said Receiver subsequent to the date of the filing of said petition or bill of said Guaranty Trust Company of New York for the foreclosure of said mortgage on the 19th day of December, 1914, be impounded for the benefits of said Guaranty Trust Company of New York and the bondholders represented by it, and adjudging that the right of said Guaranty Trust Company of New York, said Trustee, in and to said income and collections was superior to the rights and claims of appellant herein.



## IX.

Said Court erred in adjudging and decreeing that the balance of cash deemed to be on hand to apply on the claims of general creditors was \$156,464.06, and in refusing to add to said fund the income from said receivership after said 19th day of December, 1914.

ASSIGNMENTS OF ERROR ON I. P. MORRIS COMPANY'S  
APPEAL.

## I.

Said Court erred in denying and disallowing said claim of I. P. Morris Company as a preferred creditor of said Idaho Railway Light & Power Company, and over the claims of the general creditors of said Idaho Railway Light & Power Company and of the Guaranty Trust Company of New York, Trustee, and of the mortgage bondholders referred to in said decree;

## II.

Said Court erred in refusing to direct the payment of said account of I. P. Morris Company for \$26,-844.21 against said Idaho Railway Light & Power Company and the whole thereof from the income received by the Receiver of said Railway Company from the operation of said properties thereof described and referred to in said decree, and in denying and disal-

lowing the said claim of said appellant for priority or preference in payment thereof from said income, as prayed for in said Bill;

### III.

That said Court erred in refusing to direct the payment of said account of appellant herein from the proceeds of the sale of said property by the Special Master under decree of foreclosure of mortgage in the action No. 517 instituted by the Guaranty Trust Company of New York, Trustee for the mortgage bondholders, as referred to in said decree herein, and in denying and disallowing said claim of appellant for priority and preference of payment from the proceeds of said sale over and above the claims of the said Guaranty Trust Company of New York, as trustee and plaintiff in said action;

### IV.

That said Court erred in ordering, adjudging and decreeing that the said claim of I. P. Morris Company, a corporation, appellant herein, was inferior and subordinate in right to the claims of the Guaranty Trust Company of New York under the decree in favor of said Trustee in said cause No. 517;

### V.

That said Court erred in ordering, adjudging and decreeing that the said claim of appellant herein is

not a lien against any of the property covered by said decree of foreclosure in said cause No. 517 and belonging to said Idaho Railway Light & Power Company, defendant herein, and in ordering, adjudging and decreeing that said property in the hands of the Electric Investment Company, the purchaser thereof at the foreclosure sale, is free from any lien and that said claim of appellant herein was only enforceable to the extent that there were assets available for the payment thereof as prescribed in said decree, to wit, to the extent of three and 22-100 cents (.0322) on each dollar of said claim;

## VI.

Said Court erred in holding, determining and adjudging that the claim of said I. P. Morris Company, the cross-complainant, was not entitled to preference over the lien of the pre-existing mortgage or trust deed of the Guaranty Trust Company of New York because the material and supplies out of which said claim arose were not furnished or supplied within six months prior to the institution of the receivership in said above entitled cause.

## VII.

The Court erred in holding, determining and adjudging that the said claim of I. P. Morris Company, appellant herein, was not entitled to preference over the pre-existing mortgage or trust deed of the Guaranty Trust Company of New York because the ma-

terial and supplies furnished by said cross-complainant, out of which said claim arose, were furnished for new construction and not for repair or maintenance of the existing plant of said defendant Railway Company and in the ordinary operation and maintenance of said property.

### VIII.

Said Court erred in ordering and adjudging by said decree that the income of said receivership received, and all collections of cash made by said Receiver subsequent to the date of the filing of said petition or bill of said Guaranty Trust Company of New York for the foreclosure of said mortgage on the 19th day of December, 1914, be impounded for the benefit of said Guaranty Trust Company of New York and the bondholders represented by it, and adjudging that the right of said Guaranty Trust Company of New York, said Trustee, in and to said income and collections was superior to the rights and claims of appellant herein.

### IX.

Said Court erred in adjudging and decreeing that the balance of cash deemed to be on hand to apply on the claims of general creditors was \$156,464.06, and in refusing to add to said fund the income from said receivership after the said 19th day of December, 1914.



## ARGUMENT.

(In all quotations the italics are ours.)

It is respectfully urged that the claims of appellants possess all of the elements which entitle them to an equitable preference over the lien of the bondholders, viz.:

FIRST: The claims are for what is denominated by the Agreed Statement of Facts as "material and supplies," and were furnished within a reasonable time allowed by the rule established by the decisions prior to the appointment of the Receiver.

SECOND: The material and supplies were furnished to a public service corporation, namely, a railway, light and power company, in the continued operation of which the general public is interested.

THIRD: It is agreed, and is the uncontradicted fact, that *the material and supplies were necessary to the continued maintenance and operation of the railway company's property.*

FOURTH: That it was sold on an open current account for cash and in the belief that it would be paid for "*out of the current operating income,*" or earnings of the corporation.

FIFTH: All of said material "*has become a part of the railway company's system, has enlarged the same*

*and has contributed to the earnings and to the value of the properties and to the security of the bonds,"* and is a part of the property which was sold under the decree of foreclosure.

SIXTH: *The current operating income to the amount of \$115,550 on hand June 1st, 1913, derived solely from earnings and available for payment of said claims, was, through the agency of the Syndicate which owned or controlled the bonds, managed all the financial affairs of the Railway and also directed the purchase of the material, diverted from that fund and used for the payment of interest upon its own bonds, and the sum so diverted was never restored.*

Appellants respectfully contend that it would be highly inequitable, under the above conditions, for the bondholders to escape payment of these claims and yet retain both the property furnished by the appellants and also the money or current income derived from the earnings and intended for their payment, and which was diverted by them to pay interest on their own bonds. Yet the evidence in the record fairly establishes that the above statement is true, and that Mr. Samuel L. Fuller, of Kissel, Kinnicutt & Company, of New York, the manager of the bondholders' syndicate, was also the active managing director of the Idaho Railway Light & Power Company, and had charge of the administration of its financial affairs,

not only at the time the material was purchased but at the time of the diversion of the income for the payment of interest and also when the Receiver was appointed.

"Mr. Fuller was the head of the syndicate" (Testimony of O. G. F. Markhus, Receiver, Tr., p. 118).

"That syndicate is managed by my firm, as syndicate managers" (Testimony of Samuel L. Fuller, Tr., p. 129).

"Samuel L. Fuller is the vice-president of the Railway Company, and with respect to finances he was in fact its managing director" (Testimony of Receiver Markhus, Tr., p. 118).

"The order (for material) was placed here. I don't recall who instructed me to give the order, *but we got instructions from New York*" (Testimony of Receiver Markhus, Tr., p. 118).

The order on June 1st to divert the earnings of the Railway Company, available for the payment of appellants' claims, to the payment of the interest on the bonds, must also have come from the management which owned the bonds. Stated more clearly, the manager of the bondholding syndicate, who was also the Vice-President and managing director of the Railway Company, himself was responsible for the purchase of the material, which was to be paid for

out of the earnings, and almost immediately thereafter diverted the earnings to the payment of the interest on his own bonds; and a few weeks over six months thereafter, joined in the petition for the appointment of the Receiver. Among all the cases upon this subject we think none will be found in which the creditor has been denied payment and the bondholder permitted to retain the benefit, where all of the elements of preferential claims above outlined have been present. On the other hand, it will be found that wherever preference has been denied upon a claim which could reasonably be construed to be for necessary material and supplies, which is here admitted, it has been where either some or all of the above elements have been lacking. In most of them there has been no diversion of the income. In many, the claims added nothing to the value of the property, or the security of the bonds, or the property was not included in the foreclosure sale. In others, the material and supplies were not necessary to the continued maintenance and operation of the company's property, as is stipulated to be the fact in this case.

#### GROUND OF EQUITABLE PREFERENCE.

The doctrine of equitable preference has been based upon various grounds. In some cases it is said that where the mortgagee invokes a court of equity for the appointment of receiver, he must do equity and the Court has power to direct the payment of such claims



as in equity and good conscience should be paid. In others, the preference is said to be based upon the necessity of the maintenance of a public service corporation as "a going concern," and that it is essential to the convenience of the public that such corporation have credit for its necessary labor, material and supplies; that the mortgagee of the property of such corporation by implication consents to the payment of such indebtedness, and more especially is this true in the instance of a wrongful diversion of funds from the earnings for the benefit of the mortgagee.

THE CHARACTER OF PUBLIC SERVICE CORPORATIONS TO WHICH THE DOCTRINE OF EQUITABLE PREFERENCE BELONGS.

The principle applies to all public service corporations. There is no greater necessity for maintaining railroads as going concerns for the convenience of the public than any other quasi-public corporation. The doctrine is certainly not limited to steam railroads for, if so, it would vanish when that form or mode of power is supplanted by electricity. The question really does not arise in this case because the Idaho Railway Light & Power Company is a railway company engaged in the operation of "urban and suburban railway lines in the State of Idaho," and as above stated, the complaint (page 78) alleges that its properties constitute a *single indivisible unit*. The defendant does not lose its character as a railway com-

pany because in addition to the operation of railway lines it generates its own power.

#### THE AGE OF CLAIMS UPON WHICH PREFERENCE MAY BE ALLOWED.

There is no fixed rule established by the decisions as to the age of claims which may be entitled to a preference. In some circuits it has been customary for the court in the *original* order appointing a receiver, to direct the payment of claims for materials and supplies furnished within six months prior thereto, and this practice has given rise to the so-called "six months' rule." But the courts in the trial of *contested causes* have not been bound by this limitation, except, we may add, in the Eighth Circuit.

The origin of the so-called "six months' rule" is thus explained in *Foster's Federal Practice*, 5th edition, Volume I, Sec. 305, at page 962, where it is said:

"The practice arose in the Seventh Circuit to impose as a condition upon the appointment of a receiver in a suit for the foreclosure of a railroad mortgage, that debts for materials and supplies and labor furnished to the mortgagor within the six previous months be paid out of the net income, or in some cases out of the proceeds of the sale of the road, before the debt secured by the mortgage. *This is called 'the six-months' rule.'*"

On page 969 of the same authority, it appears that claims due for the following periods prior to the

appointment of receiver have been allowed a preference:

*Eight months.*

*Skiddy v. Atlantic Railroad Co.*, 3 Hughes, 320.

*Eleven months.*

*Southern Railway Co. v. Carnegie Steel Co.*,  
176 U. S., 257;

*Burnham v. Bowen*, 111 U. S., 776.

*Two years.*

*Central Trust Co. v. Wabash Railroad Co.*, 30  
Fed., 332, 334;

*Farmers Trust Co. v. Kansas City*, 53 Fed., 182.

*Three years.*

*Hale v. Frost*, 99 U. S., 389.

In the Ninth Circuit, in the case of *New York Guaranty & Indemnity Co. v. Tacoma Railroad Co.*, 83 Fed., 365, preference was allowed upon a claim for the price of a cable *for a cable street railway* purchased more than two years before the appointment of a receiver. This Court said, quoting from the syllabus, "Such priority may be allowed though more than *two years* elapsed between the time the cable was furnished and the appointment of a receiver."

We respectfully contend that the above decision fixes the rule for this Circuit. The case has not been over-

ruled, but the appellee will urge that it is inconsistent with *Spencer v. Taylor*, 194 Fed., 635. In that case, a claim contracted about a year prior to the appointment of receiver was denied for reasons stated in the opinion, but the Court did not assume to announce a hard and fast rule that preference would be denied after six months, and manifestly it could not do so, as that question was not before it.

The material and labor upon which the I. P. Morris Company claim is based was furnished and supplied within six months before the appointment of Receiver, and the question does not arise in respect to that Company's claim. The claim of the Roebling's Sons Company was incurred about seven months before the appointment of Receiver, that is, it was supplied between the 18th of March and the 30th of May, and payable thirty days from delivery of the various items. It will be seen that it was just outside of the six-months' limitation.

In the case of

*New York Guaranty & Indemnity Co. v. Tacoma Railroad Co.*, 83 Fed., 365,

above quoted, this Court said, page 370, quoting from the *Railroad Co. v. Lamont*:

“‘A preferential debt is not barred, though contracted more than six months before the appointment of a receiver. As to such debts, there is no



*arbitrary six-months' rule, as has been often decided.' "*

On the same page this Court further said:

"In the case cited the indebtedness accrued *more than six months* before the receivership. In *Atkins v. Railroad*, 3 Hughes, 307, Fed. Cas. No. 604, the claim was 22 months old at the time of the appointment of the receiver. In the case of *Hale v. Frost*, 99 U. S., 389, the supreme court gave priority to a claim for materials furnished 3 years before the appointment of the receiver, and for which a note had been given 16 months before the receiver was appointed. In *Burnham v. Bowen*, 111 U. S., 776, 4 Sup. Ct., 675, priority was given to a claim for coal supplied 11 months before the appointment of a receiver. In *Trust Co. v. Morrison, supra*, a liability incurred by the intervener as surety for a railroad company on an injunction bond to stay the execution of a judgment at law against the company, executed more than 6 years before the date of the filing of the petition in intervention, was held a preferential claim. See, also *Douglass v. Cline*, 12 Bush., 608; *Skiddy v. Railroad Co.*, 3 Hughes, 320, Fed. Cas. No. 12,922; *Williamson's Adm'rs. v. Railroad Co.*, 33 Grat., 624.

In the above case "the time that elapsed between  
 "the time of the delivery of the cable and the appoint-  
 "ment of the receiver by the state court, would there-  
 "fore be about 26 months, or a little over 2 years. . .  
 "Without elaborating upon the proposition any fur-

“ther, we are of the opinion that the claim for the cable in question should be made a preferred debt.”

In *Southern Railway Co. v. Carnegie Steel Co.*, 176 U. S., 257, the Supreme Court of the United States allowed a preference upon a claim incurred *eleven* months prior to the appointment of Receiver notwithstanding that the order of appointment contained the usual “six-months’ clause.”

In *Farmers Loan & Trust Co. v. Kansas City Co.*, 53 Fed., 182, the Court said, page 187:

“Preferential debts, it is commonly said, are those which have aided to conserve the property, and have been contracted within some reasonable period. But just what debts aid to conserve the property, and what length of time will bar them, is not very clear upon the authorities, and depends largely upon the circumstances of each particular case. There is no fixed rule barring preferential debts contracted more than six months before the appointment of the receiver. There is no ‘six months’ rule.’ In the case of *Hale v. Frost*, 99 U. S., 389, the supreme court gave priority to a claim for materials furnished 3 years before the appointment of the receiver, and for which a note had been given 16 months before the receiver was appointed. In the case of *Burnham v. Bowen*, 111 U. S., 776, 4 Sup. Ct. Rep., 675, the court gave priority to a claim for coal supplied 11 months before the appointment of a receiver. There are cases in the state courts also where priority has been given to debts contracted much more than

6 months before the appointment of the receiver. See note to *Blair v. Railway Co.*, 22 Fed. Rep., 471, 475. In the case of *Central Trust Co. v. St. Louis, A. & T. Ry. Co.*, 41 Fed. Rep., 551, the mortgages in suit were executed in 1886 and 1887, and the receiver was appointed in 1889 by Mr. Justice Brewer, then circuit judge; and afterwards, when the question arose as to what debts should have priority, Justice Brewer said:

“I do not understand from the parties making the application for the receiver that there was any desire or thought of cutting off any just claims accruing during the brief period which has elapsed since their mortgage was given, and, if counsel or party had any such idea, they much mistake my judgment in the premises.”

“The period (2 years) that elapsed between the giving of the mortgage and the appointment of the receiver in that case was the same that it is in this.”

The learned Judge below in the decision upon these claims stated, that it was true the six months' limitation was not always observed, but held that it must control in cases which are not substantially exceptional. In all the cases above cited the claims were not allowed because they were exceptional but because they came within the rule of equitable preference. But if it were necessary to establish the exceptional character of this claim, the evidence of it is found in the above statement of facts, which disclose the connection which the bondholders had with the

purchase of the property and the coincidence of the appointment of the Receiver a few weeks after the six months' period, upon the joint application of the Railway Company, whose managing director was the manager of the bondholders' syndicate. Where the rule is not inflexible and the margin of time, as in this case, is insignificant and no injury sustained thereby, it would seem that under all of the facts outlined above, were this the only question involved, it was a proper case for the allowance of a preference.

THE RULE OF DECISION CONCERNING THE CHARACTER  
OF MATERIAL AND SUPPLIES FOR WHICH CLAIMS OF  
PREFERENCE MAY BE ALLOWED.

Rarely has a case arisen involving the doctrine of equitable preference which does not revert to

*Fosdick v. Schall*, 99 U. S., 235.

The principles announced in that case have repeatedly been applied in later cases in State and Federal courts. What has sometimes been referred to as limitations on the doctrine there announced are not limitations, but merely warnings to the courts to see that the facts before them bring the case within the doctrine of *Fosdick v. Schall*. It may appear singular that in that leading case, which established the doctrine of preferential claims, a preference upon the particular claim involved was denied. But the case



should be read in connection with the companion case of

*Fosdick v. Southwestern Car Co.*, 99 U. S., 256.

In *Fosdick v. Schall*, the claim was for rental of cars sold to the mortgagor under an agreement reserving title until paid for. The property therefore was not added to the security of the mortgage and did not increase its value. Neither was there any diversion of income for the benefit of the mortgagee. The Court said, in the paragraph of the opinion of *Fosdick v. Schall*:

"The cars were not included in what was sold at the foreclosure sale, consequently they contributed nothing directly to the fund now in court for the distribution."

And again:

*"There is nothing to show that the current income of the receivership or of the company has been in any manner employed so as to deprive this creditor of any of his equitable rights. In short, as the case stands, no equitable claim whatever has been established upon the fund in court."*

The claim of preference was therefore denied.

In *Fosdick v. Southwestern Car Company*, on the other hand, the cars for which claim of preference was sought were included in the foreclosure sale and

therefore added to the value of the property and to the security of the bonds. The Court says:

“As the cars had been included in the foreclosure sale the Clerk was directed to pay the purchase price to the intervener from the fund in court.”

The general equitable considerations which justified the preference of the claim for materials and supplies before the lien of the mortgage creditor, was fully stated in *Fosdick v. Schall* and the rules therein given have not been departed from notwithstanding the warning in the *Kneeland* and *Thomas* cases to be referred to.

Speaking of the basis of the doctrine, the Court said:

“The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed, it frequently happens that debts for labor, supplies, *equipment* and *improvements* are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. *The income out of which the mortgagee is to be paid is the net income obtained by deducting from the*

*gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements."*

Referring to the implied contract, which is a part of every mortgage of a public service corporation, and which every bondholder is presumed to know and take subject to, the Court says:

"Every railroad mortgagee in accepting his security impliedly agreed that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future receipts before anything derived from that source goes to the mortgagee. *In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do.* For even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control." (Citing cases.)

Referring to diversion of current funds and to the character of the claims that should be paid from such funds, the Court says that if "*it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of the earnings which ought in equity to have been employed to keep down debts for labor, supplies and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business.*"

Referring to the payment of claims out of the earnings during the receivership, or out of the proceeds of sale under foreclosure, it says:

"While ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not infrequently materially increased."



Referring to the rules that should control the court in applying the doctrine, it says:

*"No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the Chancellor when he comes to act.*

*"The power rests upon the fact, that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belong to the whole or a part of the general creditors. Whatever is done, therefore, must be with the view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. . . . All depends upon a proper application of well settled rules of equity jurisprudence to the facts of the case, as established by the evidence."*

The principle announced in the above case has peculiar application to the facts of the present case, as the administration of the affairs of the Idaho Railway Light & Power Company was not under independent management but was controlled by the mortgage creditors themselves, which enabled them, through the diversion of the earnings to pay interest on their own bonds, to secure an undue advantage and obtain "possession of that which in equity belongs to the general creditors."

Referring to the proposition that restoration is the

end sought by the Court, it is further said in *Fosdick v. Schall*:

“Whatever is done, therefore, must be with the view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion.”

The rule is stated in *Foster's Federal Practice* above referred to, page 957, as follows:

“Even where no such order has been made when the receiver was appointed, if it appears *at any time* in the progress of the cause that interest has been paid, additional equipment provided or repairs of the property made out of its *earnings during a short time before the default* in interest, the court usually directs that such debts then incurred be paid out of the income of the receivership after the payment of the receiver's expenses, in preference to the claims of creditors secured by mortgage or other lien. Although usually they are paid out of the net income of the receiver, in special cases, especially where this income has been used to pay for betterments or mortgage interest by a receiver appointed in the foreclosure suit, or even by a receiver appointed in a prior suit to foreclose a junior lien, or to preserve the property for other creditors or stockholders, or by a reorganization committee representing the bond-

holders and stockholders, such claims have been ordered paid out of the proceeds of the foreclosure sale before any payment on account of mortgage bonds; and in some cases it has been made a condition of the sale that the purchaser pay these claims in addition to the nominal amount of his bid." Citing

*Fosdick v. Schall*, 99 U. S., 235;

*Fosdick v. Southwestern Car Co.*, 99 U. S., 256;

*Hale v. Frost*, 99 U. S., 389;

*Miltenberger v. Logansport Ry.*, 106 U. S., 286-308;

*Union Trust Co. v. Souther*, 107 U. S., 591;

*Burnham v. Bowen*, 111 U. S., 776;

*Virginia Coal Co. v. Central R. R.*, 170 U. S., 355;

*Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S., 257;

and other cases.

The next case after *Fosdick v. Schall* to come before the Supreme Court on this question was *Burnham v. Bowen*, 111 U. S., 776. In that case the court quotes with approval from *Fosdick v. Schall*, *supra*, to the effect that only the net income is subject to the mortgage, and that every mortgagee and bondholder impliedly agrees that the current debts shall be paid from the current receipts before any of the earnings be applied to the payment of interest or otherwise dis-

*bursed for the benefit of the mortgagees.* And the Court then adds:

*"Such being the case, when a court of chancery, in enforcing the rights of mortgage creditors, takes possession of a mortgaged railroad and thus deprives the company of the power of receiving any further earnings, it ought to do what the company would have been bound to do if it had remained in possession; that is to say, pay, out of what it receives from earnings, all the debts which in equity and good conscience, considering the character of the business, are chargeable upon such earnings. In other words, what may properly be determined the debts of the income should be paid from the income, before it is applied in any way to the use of the mortgagees."*

In that case the Court found that there had been no diversion of the income, but that the income was insufficient to meet the current expenses; and it was contended that as there had been no diversion there could be no restoration, and that the doctrine regarding preferential claims did not apply. As to that, the Court said:

*"The debt due Bowen was incurred to keep the road running, and thus preserve the security of the bondholders. If the trustees had taken possession under the mortgage, they would have been subjected to similar expenses to do what the company, with their consent and approbation, was doing for them. . . . Under these circumstances,*



we think the debt was a charge in equity on the continuing income, as well that which came into the hands of the court after the receiver was appointed as that before. When therefore the court took the earnings of the receivership and applied them to the payment of the fixed charges on the railroad structures, thus increasing the security of the bondholders at the expense of the labor and supply creditors, it was such a diversion of what is denominated in *Fosdick v. Schall* the 'current debt fund' as to make it proper to require the mortgagees to pay it back."

In that case the mortgagee, in order to avoid the application of the doctrine so as to make the corpus of the mortgaged estate liable for the payment of any claims, took a decree of strict foreclosure, leaving no fund for the payment of the preferential claims. But the circuit court made a provision that the property should be taken by the purchasers subject to preferential claims, and the mortgagee complained of this provision of the decree. This was in effect making the corpus of the estate liable for the payment of the claims. As to that, the Supreme Court said:

"As the diversion of the fund created in equity a charge on the property as security for its restoration, it is clear that if the mortgagees prefer to take the property under a decree of strict foreclosure, they take it subject to the charge in favor of the current debt creditor whose money they have got and that he can insist on a sale of the property

for his benefit if they fail to make the payment without."

Referring to the importance, not only as to the public service corporation but to bondholders and the public, of applying a doctrine that will not interfere with the operation of the road, even though it may be in failing circumstances, the Court said:

"The maintenance of the road and the prosecution of its business were essential to the preservation of the security of the bondholders. The business of every railroad company is necessarily done more or less on credit, all parties understanding that current expenses are to be paid out of current earnings. Consequently, it almost always happens that the current income is encumbered, to a greater or less extent, with current debts made in the prosecution of the business out of which the income is derived."

In *Union Trust Co. v. Souther*, 107 U. S., 591, the income of the receivership, instead of being applied to the payment of debts for supplies and labor, *was used at the request of the bondholders to make permanent improvements*, thus adding to the value of the property which was afterwards sold. Upon foreclosure the Court directed payment from the proceeds of the sale, of claims arising prior to the appointment of the receiver. In connection with this order the Court said:

"The income of the receivership, instead of being applied in accordance with the order to pay

the debts for the supplies and labor, was used, *with the consent, and it may fairly be inferred, at the request of the bondholders*, to buy additional grounds, rolling stock, etc., and to make permanent improvements, thus adding to the value of the property; which was afterwards sold. There is nothing whatever to indicate that in thus using the income it was the intention of the court to revoke the original order. It seems to have been found, in the administration of the cause, that by using the income to add to the value of the fixed property the interests of all parties would be promoted, and so the fund, which in equity belonged to the labor and supply creditors, was for the time being diverted from them and put into improvements and additions, the proceeds of which are now in court. It is not to be presumed that this diversion would have been authorized if the value of the property added to and improved was not to be correspondingly increased. *Clearly, therefore, on the face of the transaction, the fund in court represents in equity the income which belongs to the labor and supply creditors as well as the mortgage security, and there was no impropriety in appropriating it as far as necessary to pay the creditors specially provided for when the receiver was appointed. Such a practice, under proper circumstances, was approved in Fosdick v. Schall, ubi supra, and seems to us eminently just."*

It has been said that the language found in

*Kneeland v. American Land & Trust Co.*, 136

U. S., 89, and

*Thomas v. Western Car Co.*, 149 U. S., 95,

imposed limitation upon the rules and doctrines of the case of *Fosdick v. Schall*, and it is true that Judge Sanborn in *Illinois Trust Co. v. Doud*, 105 Fed., 123, so contends in an opinion which produced a vigorous dissent from Judge Caldwell; but the Supreme Court itself has repeatedly said that it adheres to the rules stated in *Fosdick v. Schall*. In *Union Trust Co. v. Souther*, above cited, it is said "such practice under proper circumstances was approved in *Fosdick v. Schall*, *ubi supra*, and seems to us eminently just." It will also be observed that in *Burnham v. Bowen*, *supra*, the Court said:

"So far as current expense creditors are concerned, the court should use the income of the receivership in the way the company would have been bound in equity and good conscience to use it if no change in the possession had been made. This rule is in strict accordance with the decision in *Fosdick v. Schall*, which we see no reason to modify in any particular."

The same language is repeated in *Virginia & Alabama Coal Co. v. Central R. R. Co.*, 170 U. S., 355; see pages 364-5. Concerning the opinion in this latter case Mr. Justice McKenna in his dissenting opinion in *Gregg v. Metropolitan Trust Co.*, 197 U. S., at page 195, says:

"The admonitions of the Kneeland case and the Thomas case were not overlooked. Regarding them and in connection with them, the Miltenberger



case was quoted from, and not only left undisturbed but approved."

In the case referred to, *Miltenberger v. Logansport*, 106 U. S., 286, preferential claims were allowed for the purchase of rolling stock and for the construction of five miles of road and a bridge. The facts of that case are somewhat involved but they are made clear by a review of that case by Mr. Justice White, in *Virginia & Alabama Coal Co. v. Central R. R. Co.*, 170 U. S., 356 (page 366). In this latter case, which reaffirms the doctrine of *Fosdick v. Schall* and *Burnham v. Bowen*, and *Miltenberger v. Logansport*, it is said:

"Is there any good reason why the equitable doctrine applied in the cases to which we have referred should not be applied under a state of facts such as shown at bar, where the immediate management of a road was confined by its owners, without protest or interference by the bondholders, to third parties? It would seem not. The dominant feature of the doctrine, as applied in *Burnham v. Bowen*, is that where expenditures have been made which were essentially *necessary* to enable the road to be operated as a continuing business, *and it was the expectation of the creditors that the indebtedness created would be paid out of the current earnings of the company*, a superior equity arises in favor of the materialman as against the mortgage bonds in the income arising both before and after the appointment of a receiver from the operation of the property."

The diversion admitted in the case before the Court, was made for the benefit of the mortgagee by the payment of interest on his bonds. But it is not always necessary for the claimant to show that such diversion was for the mortgagee's benefit. Referring to that question, the Court in *Virginia & Alabama Coal Co. v. Central R. R. Co.*, *supra*, said:

"It is immaterial in such case, in determining the right to be compensated out of the surplus earnings of the receivership, whether or not during the operation of the railroad by the company there had been a diversion of income for the benefit of the mortgage bondholders, either in payment of interest on mortgage bonds or expenditures for permanent improvements upon the property. Nor is the equity of a current supply claimant in subsequent income arising from the operation of the railroad under the direction of the court affected by the fact that while the company is operating its road its income is misappropriated and diverted to purposes which do not inure to the benefit of the mortgage bondholders, and are foreign to the beneficial maintenance, preservation and improvement of the property." (Citing several cases.)

This case also distinguishes the Kneeland and Thomas cases which were largely relied upon by appellees in the present cause. All the foregoing cases are reviewed in *Southern Ry. Co. v. Carnegie*

*Steel Co.*, 176 U. S., 257. Concerning the Kneeland and Thomas cases, it is said:

"In neither the Kneeland nor the Thomas case *was there any intention to question the prior decisions of the court*, which allowed priority to claims based upon the furnishing of essential and necessary current supplies, not sold upon mere personal credit, against the surplus income arising during the operation of the road under the direction of a court of equity."

The Carnegie case and the case of

*Lackawanna Iron & Coal Co. v. Farmers Loan & Trust Co.*, 176 U. S., 298,

were decided on the same day. In both cases the claim was for rails furnished to the railroad company. In the Carnegie case the claim was allowed, and in the Lackawanna case the preference was denied. A summary of the reasons for the denial of the claim in the Lackawanna case is found in the concluding paragraph of the opinion. It will be seen that the magnitude of the claim in that case was so great that it amounted practically to reconstruction of the entire railway system; that the claimant had demanded and received collateral security from the railroad company, both of which circumstances indicated that it was not a claim which was intended or understood could be paid from the current income. On the other

hand, in the Carnegie case the Court says, page 290, as follows:

*"The quantity of rails was not so large as to preclude the expectation that they could be paid for out of the current earnings of the railroad company. As already said, it was a very small quantity for the purposes of ordinary or necessary repairs and there is nothing in the record to show that the Carnegie Co. relied merely or exclusively on the personal credit of the railroad company."*

And again it is said, pages 284-5:

"It is apparent from an examination of the above cases that the decision in each one depended upon its special facts. \* \* \* \* But it may be safely affirmed, upon the authority in former decisions, that a railroad mortgagee when accepting his security impliedly agrees that the current debts of the railroad company contracted in the ordinary course of its business shall be paid out of current receipts before he had any claim upon such income; that, within this rule, a debt not contracted upon the personal credit of the company, but to keep the railroad itself in condition to be used with reasonable safety for the transportation of persons and property, and with the expectation of the parties that it was to be met out of the current receipts of the company may be treated as a current debt; \* \* \* \* and *that when current earnings are used for the benefit of mortgage creditors before current expenses are paid,*



*the mortgage security is chargeable in equity with the restoration of any funds thus improperly diverted from their primary use."*

Referring to the proportion between the claims in this case and the capital and assets of the defendant company, Receiver Markhus testified at the trial that the Idaho Railway Light & Power Company had issued preferred stock for \$3,500,000 and common stock for \$12,566,200 and the authorized capital was \$30,000,000. The complaint shows that the outstanding bonded indebtedness is about \$9,000,000. The claims in this case are approximately \$21,000 and \$26,000, respectively. It appears from the Agreed Statement of Facts *that it was intended that the claims should be paid out of the current operating income, and that this expectation was reasonable appears from the fact that when the funds were diverted on June 1st for the payment of interest to the benefit of the mortgagee, there was on hand a fund derived exclusively from the earnings of the company more than doubly sufficient to pay these claims and the claims of all others seeking a preference.*

Under the rules established by the above decisions, the claims of appellants herein, we respectfully contend, are clearly entitled to a preference, not only for payment from the income which has been diverted, but from the corpus of the property sold. The requirements for charging the corpus of the property with the claim for supplies under the rules established by the

decisions would seem to be that the material and supplies furnished must be of such character as to be necessary to the maintenance and operation of the property; that they have added to and contributed to the value of the property, and the security of the bonds, all of which facts are stipulated in the Agreed Statement of Facts herein.

But these requirements, although present in this case, are not necessary to impose a preference upon the income in case there has been a diversion to the benefit of the mortgagee. In the case of *Gregg v. Metropolitan Trust Co.*, 197 U. S. 182, decided by divided Court, the claim was for railway ties which at the time of the appointment of the receiver *had not been* used. The Court said:

“The case stands as one in which there has been no diversion of income by which the mortgagees are profited, or otherwise.”

After showing that under the circumstances the corpus could not be charged with the payment of that particular claim, the Court said:

“It is agreed that the petitioner may have a claim against surplus earnings, if any, in the hands of the receiver, but that question is not before us here.”

We repeat the statement made at the outset that on review of the many cases relating to this question,

we think none can be found wherein preference has been denied to claims possessing all of the elements shown in this case, not only entitling it to be declared a charge upon the corpus of the property itself, but upon the income which was diverted.

## DECISIONS FROM CIRCUIT COURTS OF APPEAL.

There have been a number of decisions in the different circuits to which the attention of the Court is respectfully directed. The Circuit Court of Appeals for this Circuit, as before stated, had this question before it in the case of *New York Guaranty & Indemnity Co. v. Tacoma Ry. & Motor Co.*, 83 Fed. 365, above quoted. The Court there applied fully the doctrine of *Fosdick v. Schall* and *Burnham v. Bowen et al.* It was contended that the supplies were not necessary to keep the road a going concern. In other words, it was contended that the doctrine only applied to indispensable supplies or supplies indispensable to the whole service. Referring to that matter, the Court said, page 369:

“It is true that the Supreme Court has repeatedly declared that preferential claims would be allowed but within very narrow limits, and has time and again admonished the Circuit Courts that such claims would be limited to wages of employes, supplies necessary for the maintenance of the road, and current operating expenses essential to keep it

a going concern. *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950; *Thomas v. Car Co.*, 149 U. S. 93, 13 Sup. Ct. 824; *Bound v. Railway Co.*, 7 C. C. A. 322, 58 Fed. 473; *Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co.*, 79 Fed. 202, and cases there cited. *But it is also true that the application of the general rules as to preferential claims enunciated by the Supreme Court depends to a large degree upon the particular circumstances of each case.* *Wood v. Railroad Co.*, *supra*, and cases there cited. It is upon this ground that we distinguish the many cases cited by counsel for appellants, which would seem to militate against the allowance of the claim in this case as a preferential one. We think, under the circumstances of this case, *that the cable in question, without which, confessedly, this part of the street railway system could not have been kept in operation and as a going concern*, comes within the category of debts which may be preferred over the mortgage indebtedness. We do not think, as contended for by counsel for appellants, that the cable can be regarded in the light of repairs, or for construction or improvements, within the sense of the rules laid down by such decisions as *Railway Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. 546; *Thomas v. Car Co.*, 149 U. S. 110, 13 Sup. Ct. 824, and other cases of a like character. The question here is not so much whether the cable involved in this claim for preference is to be regarded in the light of repairs, or for construction, or as an improvement, or in the nature of materials or supplies furnished; but it depends upon the inquiry



*whether or not it was necessary to keep the road 'a going concern,' within the meaning of this expression as it is used by the Supreme Court in the cases cited above."*

The same contention was made in *Railroad Co. v. Lamont*, 69 Fed. 23, involving a claim for providing, furnishing, and maintaining waiting rooms for passengers, and office room for ticket agent, and a convenient place for its employees to board and lodge at reduced rates. Judge Caldwell, speaking for the Circuit Court of Appeals, used the following language which was quoted with approval in the Tacoma case just cited:

"To defeat the preferential character of this claim, the Court would have to be satisfied that waiting rooms for passengers and an office for ticket agents are not essential or necessary, at a town of several thousand population, on the Northern Pacific Railroad. We are asked, in effect, to hold that passengers on that road, while waiting to take passage on its train, must endure the rigors of North Dakota climate without shelter, and that its ticket agent must be content with an office on the public commons, and carry his tickets in his pocket or his hat. The road is in straits, financially, but we are unwilling to believe that its business is so unremunerative and its patronage so slender as to justify it in dispensing with waiting rooms and a ticket office at one of the most important towns on its line west of the Mississippi River. Decided by

the strictest rules applicable to this class of cases, the intervener's claim was clearly a preferential debt."

The Circuit Court of Appeals for the Fourth Circuit, in *Virginia Passenger & Power Co. v. Lane Brothers*, 174 Fed. 513, had before it a claim closely resembling claims of appellants in this case and almost identical with the Morris claim. In that case the claim was for work undertaken in order to produce power by water instead of by steam, and it was contended that the claim was for construction work and of a character that would not bring it within the doctrine governing preferential claims. The intention of the company was to change from a steam plant to a water plant. The Court held that the claim should be allowed as a preferential claim.

This decision seems directly in point and is, we believe, the latest decision of an Appellate Court on the subject. We quote the syllabus of the case:

"An electric railway and light company contracted with claimant for the improvement of a water power to be used instead of steam at one of its plants, where the equipment was old, unreliable, and liable to break down. The contract provided for monthly payments in 'current funds,' and prior to the corporation's insolvency payments had been made from the general income and charged to 'construction work.' Receivers having been appointed for the corporation, they were ordered to

continue the work on their representation that a failure of the steam plant would stop all the street cars on certain of the lines and throw one of the towns in darkness, and that a completion of the water power would amount to a considerable annual saving in operating expenses. *When the receiver was appointed, the current income was more than sufficient to pay current expenses and the monthly payments under the contract*, and the receivers paid the claimant for the work done after their appointment. *Held*, that the work was not new construction, but a permanent improvement, and hence the contractors were entitled to payment of the indebtedness incurred and unpaid prior to the appointment of receivers as a preferred claim as against mortgagees."

The material and supplies are characterized by the Court there in language which seems to describe accurately the nature of both the Morris and Roebling claims. The Court says, page 517:

"It was not a new construction in the sense that the building of a new railroad, or the building of a new plant, would be, but was, as said by the Judge below, 'something necessary in furtherance of the more effective and economical operation of the existing plant.'"

In another case from the Circuit Court of Appeals a claim of preference was asserted for machinery of the same character as in the Morris claim. See

*Central Trust Co. v. Clarke*, 81 Fed., 269.

In that case the cable company replaced "a large steel gear wheel and pinion for the price of \$10,500. Before the gear wheel was completed certain changes appear to have been made in the plants for constructing the same, in consequence of which changes the cost was largely increased." The claim of preference was allowed. The Court, through Judge Sayre, said:

"We are of the opinion that the intervener's demand falls within the category of claims which have been generally recognized as of a preferential character, and equitably entitled to be paid in advance of the claims of mortgage bondholders. The gear wheel which was supplied by the Midvale Steel Company to the mortgagor company—that is to say, to the Denver City Cable Railway Company—was an important and essential part of its plant, without which the railway company could neither discharge its duties to the public nor realize an income by the use of the mortgaged property. It was necessary for the railway company to purchase a new gear wheel and pinion, in order that its cable road might be kept in operation, and that the company might preserve its franchises, and remain a going concern. The machinery in question enhanced the value of the mortgaged property by as much as such machinery was fairly worth in the market."

In the case of *Illinois Trust & Savings Bank v. Doud*, 105 Fed., 123, in an opinion by Judge Sanborn, preference was denied by the Circuit Court of Appeals



for the Eighth Circuit, by a divided Court, Circuit Judge Caldwell writing a vigorous dissenting opinion. But even in that case some of the equitable considerations which commend these claims to a court of equity were wanting. The claim was for money loaned to the corporation, but used for making certain improvements which did not result to the benefit of the mortgagees. The improvements in that case were for the purpose of carrying out a contract which had been and would continue to be a distinct loss to the corporation of at least \$2700.00 per annum. The strong dissenting opinion of Judge Caldwell appears to have been cited as frequently as the opinion of the Court.

It should be added that some of the decision of Judge Sanborn in the Doud and other cases is in striking contrast with the decisions of the Supreme Court and of other Federal Courts, as shown by the dissenting opinion of Judge Caldwell and who adds:

“It was in view of these considerations that the Supreme Court, unlike the majority of this court in the case at bar, has uniformly refused to lay down any fixed and inflexible rule for the application of the doctrine. Every case is left to be determined on its own special equities. In *Fosdick v. Schall* the Supreme Court said:

“‘No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the chancellor when he comes to act.’

“And in *Southern R. Co. v. Carnegie Steel Co.*, *supra*, after reviewing the cases, the Supreme Court says:

“‘It is apparent from an examination of the above cases that the decision in each one depended upon its special facts. This Court has uniformly refrained from laying down any rule as absolutely controlling in every case involving the right of unsecured creditors of a corporation, whose property is in the hands of a receiver, to have their demands paid out of net earnings in preference to mortgage creditors.’”

And this is again repeated at page 292, 176 U. S., page 358, where it is said:

“‘Each case, as already observed, must depend largely upon its special facts.’”

In *Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co.*, 176 U. S., 298, 315, decided on the same day with the Carnegie Steel Company case, the Court said:

“‘The decision in each case has been more or less controlled by its special facts.’”

Much of what is said by Judge Sanborn in the case referred to is dicta, and it seems to us to be marked particularly by its disregard of the equities which have appealed to the Supreme Court and other appellate courts.

The Circuit Court of Appeals for the Sixth Cir-

cuit, in *International Trust Company v. Townsend Brick & Contracting Company*, 95 Fed., 850, denied preference in that case for a claim for the construction of an abutment to a new bridge. But in that case, also, the question of displacing the contract lien was involved, as there was no income, either before or after the appointment of a receiver, to be applied to the claim, or that had been devoted for the benefit of the mortgagees. *And in such cases a much stricter rule is applied than where the earnings of the property are sufficient to pay the claim*, and where the corpus of the mortgaged estate may be left intact for the benefit of the mortgagees, notwithstanding the allowance of the claim.

We think it clearly appears from the decision in that case that the claim would have been allowed had there been earnings from which the claim would have been paid. The Court said:

“But, if there has been no diversion of the current income, either before or after the appointment of a receiver, and no ‘surplus income’ during the receivership, out of which unpaid debts of the income can be paid, upon what theory can the proceeds of a mortgage foreclosure sale be applied to the payment of such debts against the objection of mortgage creditors? If nothing has been diverted from the ‘current debt fund,’ if there has been no augmentation of the fund applicable primarily to the satisfaction of the mortgage creditors, is there any just or equitable reason for

requiring the restoration where nothing has been improperly received? We think in such cases the court has no power to displace contract rights, and neither *Fosdick v. Schall* nor any of the cases which have followed it afford any sufficient authority, when rightly understood, in opposition to this view. These 'debts of the income' are an 'equitable charge' only upon the 'current income' of the mortgaged railroad. If such debts remain unpaid when the railroad passes into possession of a court of equity, this 'equitable charge' is continued, and attached to the 'surplus income' arising under the receivership. If the surplus income is not applied to the payment of the debts to which it is primarily devoted, *but is expended for the benefit of the mortgagee, as in payment of interest, or in the purchase of property which passes under the mortgage, or in betterments of the railroad itself, an equity arises, as a consequence of such diversion, which will justify a court of equity in requiring the mortgagee to restore to the income that which has been taken away. The power of the Court to displace mortgage liens in favor of such unsecured debts of the mortgagor depends upon the fact that the current income, either before or after the receivership, has been diverted to the benefit of the displaced mortgagee, and the extent to which the corpus of the mortgaged property can be called upon to pay such debts of the income is limited by the amount of the diversion."*



Referring to the effect of the bondholders being in active management of the railway, an instructive case is found—

*Queen Anne's Ferry Co. v. Railway Co.*, 148  
Fed., 41, 162 Fed., 828,

which was affirmed on appeal.

In this case the contention of the bondholders seems to be entirely without equity. It appears that they formed themselves into a syndicate which directed the operation of the railway company, and, we think the evidence shows, directed the purchase of the particular supplies and materials here involved. This indebtedness was created by the bondholders and for their own benefit. After diverting to their own use the current income fund intended for the payment of these claims, they should not be permitted to hold the property which added to the value of the securities without paying for it. The requirements of the company's business made it necessary to purchase it. It was of such a character and the necessity for its use was such that the Court, on application of a receiver, would sanction its purchase. Though there are some dicta to the contrary, the same rule of equitable preference is to be observed whether the Court is passing upon a claim contracted before the appointment of receiver, or hearing an application for permission to purchase supplies and make "useful improvements" after the receiver is appointed.

In determining whether claims of this character are for construction or for maintenance and operation, the amount of the improvement or repair must be considered with reference to the magnitude of the enterprise and the value of the system as a whole and not some particular portion of it, and especially in this case where all the properties of the Railway Company constituted an independent system. The Railway Company's outstanding capital was about \$16,000,000 in stock and \$9,000,000 in bonds. The net income of the company, even after the diversion on June 1st, was approximately three times more than sufficient to pay the preferential claimants. Appellants' claims are relatively small for a corporation of this magnitude.

### SUMMARIZING.

It is admitted by the Agreed Statement or by the uncontradicted evidence:

*First:* That the accounts of the above claimants are correct and are for materials and supplies furnished to a public service corporation;

*Second:* That the material and supplies were necessary to the continued maintenance and operation of the Railway Company's property;

*Third:* That they were sold in the belief that they would be paid for out of the current operating income or earnings;

*Fourth:* That operating income, more than sufficient to pay all claims of preference, was diverted to pay interest on the bonds;

*Fifth:* That the manager, or head of the syndicate owning the bonds, was the managing director of the Railway Company and had active charge of its financial affairs. We do not urge that this fact constitutes an estoppel, nor is it intended as a charge of bad faith or fraud, but it is an important element to be considered among all of the facts of the case in establishing an equitable preference;

*Sixth:* That the net operating income, after the diversion, was approximately \$160,000, but the \$115,000 of earnings diverted on June 1st were never restored;

*Seventh:* That the Railway Company joined in the application for a receiver on December 23, 1913;

*Eighth:* That all of said material has become a part of the property, has added to its value and its earnings, has increased the security of the bonds and was a part of the property sold under foreclosure;

*Ninth:* Considering the amount of the claims and the value of the company's plant, the work done was only a reasonable improvement necessary for maintenance and operation.

Upon the whole, it is submitted that the Court below erred in denying the respective claims of appellants herein for a preference over the mortgage bond-

holders for balance due upon their several claims, and appellants pray that the said decree of said Court in these respects be reversed and this Court render judgment directing that said claims of preference be allowed.

Respectfully submitted.

BEVERLY L. HODGHEAD,  
*Attorney and Solicitor for John A. Roebling's  
Sons Company of California, a corporation,  
and I. P. Morris Company, a corporation.*





IN THE

**United States Circuit Court of Appeals**  
In and for the Ninth Circuit

JOHN A. ROEBLING'S SONS COMPANY OF CALI-  
FORNIA and I. P. MORRIS COMPANY

Appellants

vs.

IDAHO RAILWAY LIGHT & POWER COMPANY,  
O. G. F. MARKHUS, Receiver of said Company,  
GUARANTY TRUST COMPANY, Trustee, ELEC-  
TRIC INVESTMENT COMPANY, AMERICAN STEEL  
AND WIRE COMPANY, GENERAL ELECTRIC COM-  
PANY and WESTINGHOUSE ELECTRIC AND MAN-  
UFACTURING COMPANY

Appellees

No. 2813

**ANSWERING BRIEF OF APPELLEES, IDAHO  
RAILWAY LIGHT & POWER COMPANY,  
O. G. F. MARKHUS, Receiver, etc., GUAR-  
ANTY TRUST COMPANY and ELEC-  
TRIC INVESTMENT COMPANY**

JOHN F. MAC LANE

Salt Lake City, Utah

Attorney and Solicitor for Appellees Above-Named

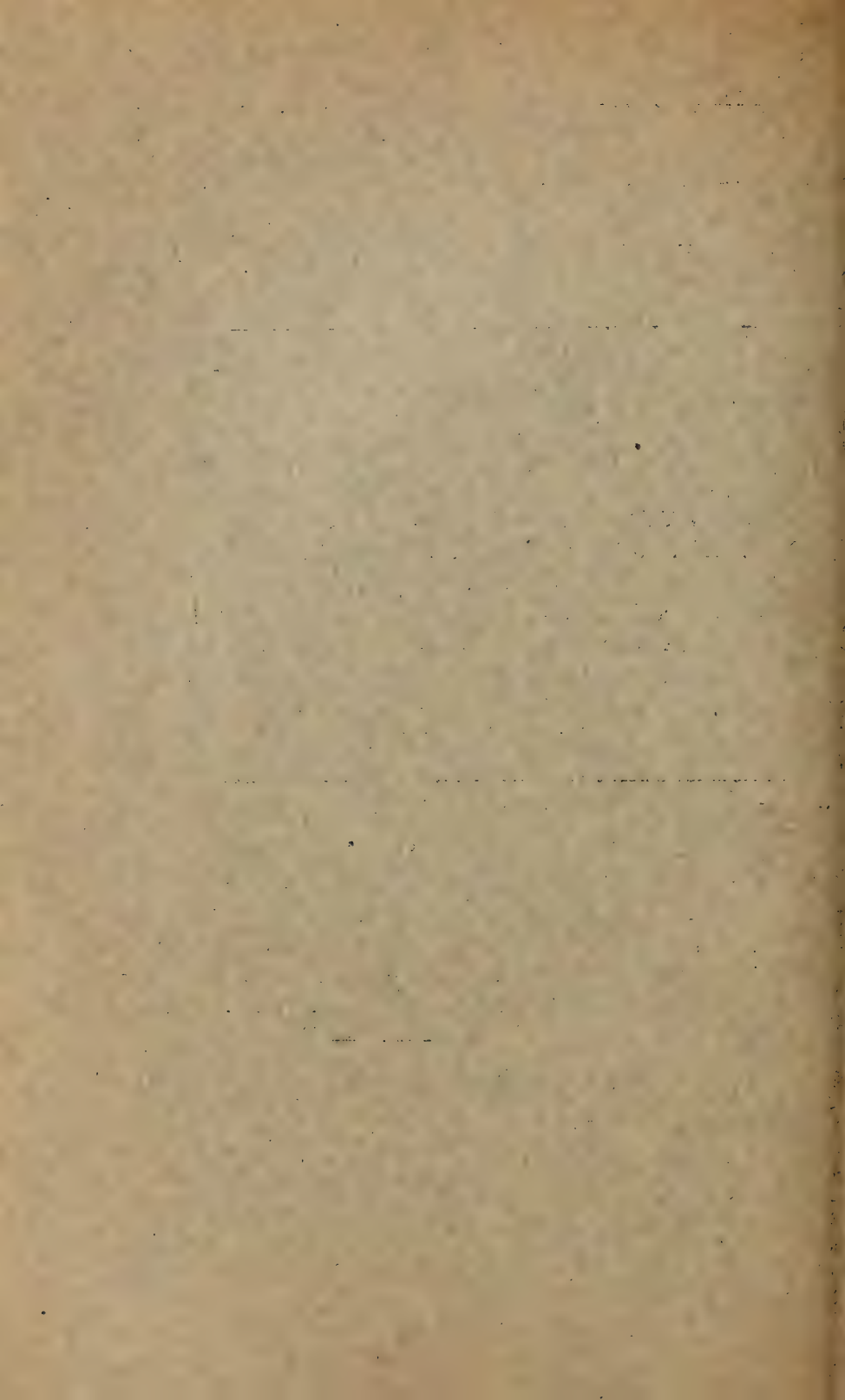
HENRY ROOT STERN

New York City, N. Y.

Of Counsel

Filed

OCT 23 1915



# United States Circuit Court of Appeals

In and for the Ninth Circuit.

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JOHN A. ROEBLING'S SONS COMPANY  
OF CALIFORNIA AND I. P. MORRIS  
COMPANY,

*Appellants,*

*vs.*

IDAHO RAILWAY LIGHT AND POWER  
COMPANY, O. G. F. MARKUS, Re-  
ceiver of said company, GUARANTY  
TRUST COMPANY, Trustee, ELEC-  
TRIC INVESTMENT COMPANY, AMER-  
ICAN STEEL & WIRE COMPANY, GEN-  
ERAL ELECTRIC COMPANY AND  
WESTINGHOUSE ELECTRIC AND  
MANUFACTURING COMPANY,

*Appellees*

No. 2813.

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**ANSWERING BRIEF OF APPELLEES  
IDAHO RAILWAY LIGHT & POWER  
COMPANY, O. G. F. MARKHUS, RECEIVER  
OF SAID COMPANY, GUARANTY TRUST  
COMPANY, TRUSTEE, AND ELECTRIC  
INVESTMENT COMPANY.**

## **Preliminary Statement.**

The facts are so fully discussed in connection with the subsequent argument that there is little to add at this point, to the statement of the case presented by the appellants in their opening brief and to the concise summary of the proceedings contained in the opinion



of Judge Dietrich, to be found at pages 134 and 135 of the transcript.

We shall, therefore, merely refer to certain isolated facts not mentioned by the appellants which might otherwise escape the attention of the Court.

The mortgage, which was the subject of the foreclosure suit, covered all after acquired property and all income and profits of all of the properties subject to the mortgage (Tr., p. 99).

Nevertheless, the Court below refused to impound for the benefit of the bondholders any of the income received or collections made by the Receiver prior to December 19, 1914, viz.: for a period of about one year after the appointment of the Receiver, and the income and collections of that year were set apart by the Court for distribution among the *general* creditors (Tr., pp. 159, 160). The record does not show what, if any, income was earned by the Receiver subsequent to December, 1914.

The property was sold under foreclosure to the Electric Investment Company for a sum only sufficient to pay to the bondholders a dividend of \$534.15 on each thousand dollar bond outstanding, *or only a little over 53 per cent.* (Tr., p. 111).

All payments made by the Receiver for the first year of his receivership for interest, sinking fund payments upon underlying mortgages and construction were charged by the Court below against the Trustee and the bondholders represented by it, except interest and construction payments made on account

of the Boise Railroad Company, the properties of which company were held by the Court not to be subject to the mortgage of the Guaranty Trust Company (Tr., pp. 160, 161).

Five creditors intervened, claiming the right to equitable preference for their claims, namely, John A. Roebling Sons Company, I. P. Morris Company (both of which are appellants in this Court), American Steel & Wire Company, General Electric Company and Westinghouse Electric & Manufacturing Company. All of these claims were disallowed as preferred claims, except that in the case of the three claimants last mentioned certain minor items of their claims were so allowed (Tr., pp. 152, 153). Neither the American Steel & Wire Company, the General Electric Company nor the Westinghouse Electric & Manufacturing Company, however, appealed from the decree of the Court disallowing the balance of their claims and, in fact, they refused to join in the said appeal, and accordingly are named as appellees after severance (Tr., pp. 180, 181).

The appellants lay considerable stress upon the allegation in the bill of complaint of the Guaranty Trust Company, referring to the various properties subject to the mortgage and described in detail at pages 95 to 99 of the transcript, reading as follows:

“That said properties, real and personal, constitute a single, indivisible hydro-electric power system, including stations, sub-stations, transmission and distribution lines, *and* a single indivisible

electric street and interurban railway system with properties appurtenant to, and used in connection with, said power and railway properties" (Tr., pp. 99, 100).

Appellants apparently construe this allegation as meaning that all of the property subject to the mortgage constituted but *one* system. What the bill of complaint actually alleged, however, was that the properties, when properly grouped, constituted *two* systems—first, a hydro-electric power system and, secondly, an electric street and interurban railway system.

The materials furnished by the claimants were used solely in connection with the power system and consisted, in so far as the appellant Roebbling's Sons Company is concerned, in copper wire used principally in the construction of a new transmission line approximately thirty miles in length from the Swan Falls Power Plant of the Railway Company to the pumping plant of an irrigation company, and, the balance in the construction of extensions to the existing irrigation system of another company known as the Idaho-Oregon Light & Power Company.

So far as the appellant I. P. Morris Company is concerned, the material furnished by it consisted in important power machinery required in order to increase the capacity of the Swan Falls Power Plant,

"and the enlargement and improvement made at the Swan Falls Plant under the Morris contract was for the purpose of putting the Railway Com-

pany in a condition *to better serve its customers* and to supply the *increasing demand* for electric current" (Tr., p. 69).

After the installation of the machinery supplied by the I. P. Morris Company, the latter generated twenty-five forty-seconds, or approximately 60 per cent. of the total capacity of the Swan Falls Plant, which was the only power plant owned and operated directly by the Railway Company (Tr., p. 70).

The stipulation of facts states that the claimant John A. Roebling Sons Company sold and delivered the copper wire in question between the 18th of March and the 30th of May, 1913, but there is nothing in the record to show what items were delivered on any particular day or days during that period. Payment was due "on bills as rendered within thirty days from the delivery of the various items specified," so that nothing could have been due on this claim before April 18, 1913. Prior to the appointment of the Receiver, the defendant company paid to the claimant the sum of \$17,519.80 on account, leaving a balance due of \$21,057.37 with interest (Tr., pp. 42, 43). There is nothing in the record to show that the claimant applied this payment in satisfaction of any particular part of the account.

With regard to the I. P. Morris claim, for the furnishing and installation of power machinery, the contract was not completed until the latter part of September, 1913. On December 9, 1913, the Railway Company formally accepted the machinery furnished



and work done by the claimant, and thereupon paid the latter the sum of \$21,266 and gave its two promissory notes each in the sum of \$13,246.58, one due in three months and the other in six months from date. There is nothing in the record to show that any particular application was made by the claimant of the payment in question to any particular portion of the claim. The material was furnished and work performed under a contract between claimant and the defendant company entered into on October 31, 1912, about fourteen months prior to the appointment of the Receiver.

The claim made by the appellants that their debts should receive equitable preference is predicated upon the contention that there was a so-called diversion of income amounting to \$115,500 arising from the payment of bond interest by the defendant company on June 1st, 1913, amounting to \$165,750.

We have analyzed this contention and the figures on which it is based so fully under Point II (*infra*), that it will be sufficient at this stage merely to point out that the payment in question, with the exception of about a little over a thousand dollars, was made out of deposit reserves, theretofore, set up by the defendant company from its earnings and from the proceeds of sale of its bonds during December, 1912, January, February, March and April, 1913.

*In other words, to the extent that earnings were included at all in the payment of June 1st, they were practically altogether earnings which had been made*

*by the defendant company prior to the accrual of the claims of either of the claimants and did not include earnings within approximately eight months prior to the appointment of the Receiver.*

One further fact is to be noted with respect to the I. P. Morris claim, namely, that, to the extent of \$5,138, it consists of an item of extra parts called for by the contract, but never furnished by the claimant either to the Railway Company or to its Receiver (Tr., p. 68). We do not understand that this appellant seriously contends that so much of its claim as consists in the price of the undelivered spare parts is entitled to preference.

The following are the principal questions presented by this appeal:

1.

*Was the material furnished by the respective claimants in the nature of current supplies to be used in connection with the ordinary daily operation of the Company, and normally payable out of current earnings, or was it supplied for new construction, extensions or improvements of an extraordinary nature, properly chargeable to capital account?*

2.

*Was there any diversion of net income earned after the accrual of the claims in suit?*

3.

*Did the claims accrue within a sufficiently short time prior to the appointment of the receiver so as to justify their inclusion in the preferential class?*

## Points and Authorities.

### 1.

NEITHER OF THE CLAIMS IS FOR MATERIAL OR SUPPLIES FURNISHED TO THE COMPANY IN CONNECTION WITH THE CURRENT DAILY OPERATION EITHER OF ITS TROLLEY LINES OR ITS POWER PLANT. ON THE CONTRARY, ONE OF THEM REPRESENTS THE BALANCE OF A DEBT FOR OVER \$38,000 FOR COPPER WIRE FURNISHED TO THE DEFENDANT COMPANY, PARTLY FOR THE BENEFIT OF ANOTHER COMPANY, FOR USE IN THE CONSTRUCTION OF A NUMBER OF NEW EXTENSIONS THEN BEING INSTALLED BY THAT OTHER COMPANY, AND PARTLY IN CONNECTION WITH THE CONSTRUCTION OF AN ENTIRELY NEW AND IMPORTANT TRANSMISSION LINE THEN BEING BUILT BY THE DEFENDANT COMPANY; THE OTHER REPRESENTS THE BALANCE OF A DEBT OF OVER \$48,000 FOR THE SALE OF MACHINERY WHICH PRODUCES ABOUT 60 PER CENT. OF THE TOTAL CAPACITY OF THE DEFENDANT COMPANY'S POWER PLANT.

*Kneeland vs. American Loan Co.*, 136 U. S., 89;

*Porter vs. Pittsburgh Bessemer Steel Co.*, 120 U. S., 649;

*Toledo R. R. Co. vs. Hamilton*, 134 U. S., 296;

*Wood vs. Guaranty Trust and Safe Deposit Co.*, 128 U. S., 416;

*Southern R. R. Co. vs. Carnegie Steel Co.*, 176 U. S., 257;

- Lackawanna Coal and Iron Co. vs. Farmers' Loan and Trust Co.*, 176 U. S., 298;  
*High on Receivers*, 4th Ed., Sec. 394-h;  
*Street on Equity Practice*, Vol. 3, Sec. 2750;  
*Bound vs. South Carolina Ry. Co.*, 58 Fed., 473;  
*Reyburn vs. Consumers G. F. and L. Co.*, 29 Fed., 561;  
*California S. D. and T. Co. vs. Yakima Inv. Co.*, 82 Fed., 542;  
*Doud vs. Illinois Trust and Savings Bank*, 105 Fed., 123;  
*Gregg vs. Metropolitan Trust Co.*, 197 U. S., 183;  
*Rhode Island Locomotive Works vs. Continental Trust Co.*, 108 Fed., 5;  
*Niles Tool Works vs. Louisville, N. A. and C. Ry Co.*, 112 Fed., 561;  
*Rodger Ballast Car Co. vs. Omaha K. C. and E. R. Co.*, 154 Fed., 629;  
*Central Trust Co. vs. Colorado Ry. L. and P. Co.*, 200 Fed., 85;  
*Love vs. North American Co.*, 229 Fed., 103;  
*Atlantic Trust Co. vs. Dana*, 128 Fed., 209;  
*Lee vs. Penn Traction Co.*, 105 Fed., 405;  
*Atlantic Trust Co. vs. Woodbridge C. and Ir. Co.*, 79 Fed., 39;  
*Spencer vs. Taylor Creek Ditch Co.*, 194 Fed., 635.



## II.

THE CLAIMANTS UTTERLY FAILED TO SUSTAIN THE BURDEN RESTING UPON THEM TO SHOW A DIVERSION OF CURRENT INCOME EARNED BEFORE THE ACCRUAL OF THE DEBTS UPON WHICH THEIR CLAIMS ARE BASED.

*Gregg vs. Metropolitan Trust Co.*, 197 U. S., 183;

*Central Trust Co. vs. East Tennessee, V. and G. R. Co.*, 80 Fed., 624;

*Kansas Loan and Trust Co. vs. Electric R'way, L. and P. Co.*, 108 Fed., 702;

*Fordyce vs. Omaha, Kansas City and E. R. R. Co.*, 145 Fed., 544;

*St. Louis, Alton and Terre Haute R. R. Co. vs. C. C. C. and I. R. Co.*, 125 U. S., 658;

*Lincoln Trust Co. vs. Missouri Water, Light and Traction Co.*, 131 S. W., 889.

## III.

CONCEDEDLY THE ROEBLING CLAIM ACCRUED MORE THAN SIX MONTHS PRIOR TO THE APPOINTMENT OF THE RECEIVER. EITHER THE SAME IS TRUE WITH RESPECT TO THE I. P. MORRIS CLAIM, OR THERE WAS NO DIVERSION OF INCOME AFTER THE ACCRUAL OF THAT CLAIM. IN NEITHER CASE IS THERE ANY SPECIAL EQUITY REQUIRING THE COURT TO DISREGARD THE SIX MONTHS' RULE.

*Thomas vs. Peoria and R. I. R. R. Co.*, 36 Fed., 808;

*Central Trust Co. vs. E. Tennessee V. and G. R. Co.*, 80 Fed., 624;

*Reyburn vs. Consumers G. F. and L. Co.*,  
29 Fed., 561;

*Rodger Ballast Car Co. vs. Omaha, K. C.  
and E. R. Co.*, 154 Fed., 629;

*Moore vs. Donahoo*, 217 Fed., 177;

*Spencer vs. Taylor Creek Ditch Co.*, 194  
Fed., 635;

*Cook on Corporations*, 7th Ed., Vol. 4, Sec.  
661;

*Westinghouse Air Brake Co. vs. Kansas City  
So. Ry. Co.*, 137 Fed., 26;

*Blair vs. St. Louis R. R. Co.*, 22 Fed., 471.

## ARGUMENT.

### I.

**Neither of the claims is for material or supplies furnished to the Company in connection with the current daily operation either of its trolley lines or its power plant. On the contrary, one of them represents the balance of a debt for over \$38,000 for copper wire furnished to the defendant Company, partly for the benefit of another company, for use in the construction of a number of new extensions then being installed by that other company, and partly in connection with the construction of an entirely new and important transmission line then being built by the defendant Company; the other represents the balance of a debt of over \$48,000, for the sale of machinery which produces about 60 per cent. of the total capacity of the defendant Company's power plant.**

The question as to when and under what circumstances material and supply claimants may, in railroad foreclosures, be granted priority over the lien of a pre-existing mortgage has been so exhaustively discussed in a long line of decisions of the Supreme Court of the United States and in the various Circuit Courts since the year 1878, when the pioneer case of *Fosdick v. Schall* was decided, that it would not be profitable to review here the variegated history of this doctrine.

The enormous development and expansion of railroad construction and operation throughout this country during the last forty years, and the mass of litigation in federal courts, involving this question has, naturally, brought about many modifications in and limitations of the main principle, which was formulated at a time when the difficulties of applying it to the numerous and diverse claims resulting therefrom were not, perhaps, fully appreciated.

The evils that might flow from a loose application of some of the general expressions contained in the opinion of the Court in *Fosdick v. Schall* were fully apparent to the Supreme Court about ten years later. Clear evidence of this is to be found in the following language of Judge Brewer in the case of *Kneeland v. American Loan Co.*, 136 U. S., 89, at pages 97 and 98:

“Because in a few *specified and limited cases* this Court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a Court appointing a receiver acquires power to give such preference to *any* general and unsecured claims. \* \* \* *Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the Court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot.* \* \* \*

No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of



subsequently displacing the priority of the mortgage liens. *It is the exception and not the rule that such priority of liens can be displaced.* We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea, that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens" (Italics ours).

This language was quoted with approval by the same Court in the later case of *Thomas v. Western Car Company*, 149 U. S., 95, at page 111.

The *character* of the claims which the Supreme Court at that date, and ever since, has had in mind as deserving preferential treatment is illustrated by the following language of Judge Shiras, *id.* page 112:

"The case of a corporation for the manufacture and sale of cars, dealing with a railroad company, whose road is subject to a mortgage securing outstanding bonds, is very different from that of work-men and employes, *or of those who furnish, from day to day, supplies necessary for the maintenance of the railroad*" (Italics ours).

It had been previously settled by a number of decisions in the Supreme Court that claims for labor or supplies furnished in connection with *construction* work, as distinguished from ordinary *operating* expenses, were not entitled to preferential treatment.

"We are not aware of any well-considered adjudged case, which, in the absence of a statutory provision, holds that unsecured floating debts for *contruction* are a lien on a railroad superior to the lien of a valid mortgage duly recorded, and of

bonds secured thereby and held by *bonafide* purchasers for value. The authorities are all the other way." (Italics ours.)

*Porter vs. Pittsburg Bessemer Steel Co.*, 120 U. S., 649, at 671; opinion of Blatchford, J.

See also

*Toledo R. R. Co. vs. Hamilton*, 134 U. S., 296, at page 301, et seq., and  
*Wood vs. Guaranty Trust and Safe Deposit Co.*, 128 U. S., 416,

where Mr. Justice Lamar held, in answer to the contention that a claim for construction was entitled to a preference, at page 421, as follows:

"The argument is unsound. There are several answers to it. First, it overlooks the vital distinction between a debt for construction, and one for operating expenses. The doctrine of *Fosdick v. Schall* is applicable wholly to the latter class of liabilities. In the case of *Cowdrey v. Galveston Railroad*, 93 U. S., 352, it was settled that the doctrine does not apply where it is a question of original construction. Secondly, it overlooks the important fact that the doctrine only applies where there is a diversion of the income of a 'going concern' from the purpose to which that income is equitably primarily devoted; viz., *the payment of the operating expenses of the concern*. In other words, the income must be first devoted to the *expenses* of producing the income." (Italics ours.)

The foregoing principles were, if possible even

more clearly defined and applied in the two leading cases of *Southern Railway Co. vs. Carnegie Steel Company*, 176 U. S., 257, and *Lackawanna Iron and Coal Co. vs. Farmers' Loan and Trust Co.*, 176 U. S., 298. In the *Southern Railway* case, the Carnegie Steel Company filed a claim for preference for \$125,067.49 (id. 272) for steel rails furnished to the Danville Company from time to time. The total mileage of the Danville Railroad, including its auxiliary portions aggregated 3,320 miles (id. 259). The business of the road was so enormous that even during the receivership, the *net* earnings for the period of thirteen months and a half were approximately three million three hundred thousand dollars.

After a full review of all the previous cases in the Supreme Court, Mr. Justice Harlan held as follows, at page 285:

“But it may be safely affirmed, upon the authority of former decisions, that a railroad mortgagee when accepting his security impliedly agrees that the *current* debts of a railroad company contracted in the *ordinary course of its business* shall be paid out of *current* receipts before he has any claim upon such income; that, within this rule, a debt not contracted upon the personal credit of the company, but to keep the railroad itself in condition to be used *with reasonable safety for the transportation of persons and property*, and with the expectation of the *parties* that it was to be met out of the *current* receipts of the company, may be treated as a current debt; that whether the debt was contracted upon the personal credit of the

company, without any reference to its receipts, is to be determined in each case by the amount of the debt, the time and terms of payment, and all other circumstances attending the transaction.” (Italics ours.)

It appeared that after the receivers were appointed, they obtained an order from the court authorizing them to purchase 2,500 tons of new steel rails from the Carnegie Steel Company, on the ground that the financial difficulties of the company during the previous two years had “prevented the operating officers from being able to expend the proper amount for new rails and upon the roadbed and structures, to keep the railroad in the condition in which it should be maintained” (id. 288). The Court below thereupon passed the order authorizing the receivers to make the purchase in order “to properly operate the railroads (in the charge of the receivers) and for the safety of persons and property transported” (id. 228). The Supreme Court held on this point as follows, at pages 288 and 289:

“It is apparent that the purchases of new steel rails while the railroads were in possession of receivers were made in the ordinary course of business and were properly chargeable upon and payable out of current receipts in preference to the claims of mortgage creditors. In every substantial sense the expenses thus incurred were *operating expenses*. \* \* \* Surely the quantity of rails purchased from the Carnegie Company and delivered in 1891 was insignificant in view of the interests involved and the extensive mileage of the



*John A. Roebling's Sons Company, et al., vs.*

Danville system, and was by no means so large as to suggest that they were to be used in constructing new and additional road, and not to keep existing roads in proper condition for use. Every railroad company must have on hand a limited quantity of rails in order to keep every part of its line in proper and safe condition." (Italics ours.)

And again at page 290:

"The quantity of rails was not so large as to preclude the expectation that they could be paid for out of the current earnings of the railroad company. As already said, it was a very small quantity for purposes of ordinary or necessary repairs." (Italics ours.)

On the same day, the Supreme Court decided the *Lackawanna Iron and Coal Company* case. In that case, the total number of tons of steel rails delivered was approximately 18,600 (id. 304) as against about 4,200 delivered by the Carnegie Steel Company in the case previously decided. The total mileage of the railroad system was approximately 403 miles (id. 298). Although the master found as a fact that,

"when the aforesaid contracts were made with the said Lackawanna Company both seller and buyer expected the debts to be paid from the net income of the railway" (id. 303),

the Court held as follows:

"The principal ground upon which the Lackawanna Company bases its claim for the relief asked is that when each of the above contracts were made the Waco Division was in such condition that new rails were imperatively required in order

that the road might be safely used for the transportation of persons and property. Such, it may be assumed, was the condition of the road when the rails were contracted for and delivered, for it was so found by the master to whom the intervening petition of the Lackawanna Company was referred with direction to take the account prayed for and to report the facts, and to that report no exceptions were filed. But the necessary inference from the report in connection with the averments of the intervening petition, is that the work required to be done in order to put the main road of the Houston and Texas Central Railway Company and its divisions in proper condition was *not such as would be done in the ordinary course of the business and operations of a railroad*, but was so extensive as to amount to *reconstruction, or the construction of new road*. \* \* \* This Court has uniformly held that in the distribution of the current earnings of an insolvent railroad company, whose property is being administered by a receiver, mortgage creditors could not be postponed to unsecured creditors, unless the debts due the latter were of the class known as *current debts arising in the ordinary course of business and properly chargeable upon current receipts*. The decision in each case has been more or less controlled by its special facts. But we are of opinion that such expenditures as those incurred in the making of the contracts with the Lackawanna Company were not such as are made in the ordinary course of the operations of a railroad, and cannot be deemed *current* debts within the rule that a railroad mortgagee when accepting his security impliedly agrees that the *current* debts of

a railroad company contracted in the ordinary course of its business, in order to keep it a going concern, shall be paid out of *current* receipts before he has any claim upon such income. *Southern Railway Co. v. Carnegie Steel Co.*, ante, 257, and authorities there cited. They are rather to be regarded as *extraordinary expenditures, outside of the ordinary course of business and incurred for purposes not of repair, but of construction*. This Court has said that it is the exception, not the rule, that the priority of mortgage liens can be displaced. *Kneeland v. American Loan and Trust Co.*, 136 U. S., 89, 98; *Thomas v. Western Car Co.*, 149 U. S., 95, 111. We have said that priority of unsecured claims is recognized only in a *few specified cases in which equity and good conscience require that the vested liens of mortgage creditors shall be postponed in the application of current earnings to current debts*. Sound principle forbids that a court of equity should imply an agreement upon the part of mortgage creditors to subordinate their claims to such debts as those due to the Lackawanna Company. *To so hold would place their rights at the mercy of the railroad company having charge of the property upon which their recorded liens rest*" (id., pp, 314, 315 and 316). (Italics ours.)

It is true that the opinion refers to the fact that the rails had been delivered over a long period before the appointment of the receiver, and that the Lackawanna Company had received collateral security for a part of its claim, but these were mentioned as merely *additional* reasons why the claimant was not entitled to a preference, and without in any manner

detracting from the main ground of the decision hereinafore quoted.

That the doctrine of equitable preference has been clearly limited by the more recent decisions of the Federal courts to claims for supplies furnished in connection with the current operation of the road in the ordinary course of business and does not include claims for extraordinary expenses or improvements or for construction work, is fully recognized by the leading text-book writers on this subject. For instance, High on Receivers, 4th Ed., after criticising the principle of the main doctrine itself, from the point of view of strict logic (Sec. 394-a, p. 503) expresses the particular limitation thereon, which we are now discussing, in the following language:

“SEC. 394-h. CLAIMS OF GENERAL CREDITORS OTHER THAN FOR OPERATING EXPENSES NOT PREFERRED. Claims of general creditors of a railway company, which have been incurred prior to the receivership, and which do not fall within the class of current expenses for the ordinary operation and maintenance of the road, such as necessary labor, supplies, materials or equipment, and which do not, therefore, have any special equities entitling them to payment out of current income, will not be preferred out of the earnings of the receiver, or out of the proceeds of the foreclosure sale. The allowance of claims, which results in the displacement of the priority of mortgage liens, is to be regarded as the exception and not as the rule, and such claims will not be given a preference unless they may fairly and reasonably be regarded as debts in-



curred in the *ordinary, daily operation* and maintenance of the road. And where the expense is an extraordinary one, incurred outside the ordinary course of the business of the road, such as for original construction or reconstruction, or for *extraordinary repairs*, or for *extensions or permanent improvements*, the preference will not be granted. And while, from the illustrations given in the preceding sections, where preferences have been given, it will be seen that the courts have, in particular instances, gone to unwarranted extremes in the recognition of such claims, the *decided tendency at the present time*, as shown by the recent cases, is to *restrict* rather than to extend the allowance" (pp. 524, 525). (Italics ours.)

Thereafter, and at pages 525, 526, 527 and 528, the author proceeds to recite case after case, wherein claims for preference were made, in many of which the equity of the claimants greatly exceeded the alleged equities of the claimants in the case at bar, but where nevertheless a preference was uniformly denied.

Street, in his interesting and authoritative work on Federal Equity Practice, Vol. 3, Sec. 2750, page 1585, after discussing the origin and development of the main doctrine, expresses the same views in the following language:

"SEC. 2750. LATE LIMITATION ON DOCTRINE OF EARLIER CASES. The doctrine of these cases has had extensive application in the Federal courts during the last quarter of a century. From time to time the Supreme Court has taken occasion to say that the power thus recognized should be sparingly used; and finally this Court has been impelled to *recon-*

sider its previous utterances and to *limit* the doctrine strictly to those situations where the claim is at its inception *a proper charge against the current account* and where the current income is sufficient to pay such claim or where money has been diverted from that fund.” (Italics ours) (p. 1585.)

And again at Sec. 2751, as follows:

“SEC. 2751. NO PREFERENCE OF BACK DEBT UNLESS CHARGEABLE AGAINST CURRENT ACCOUNT. The most important point to be here borne in mind is found in the proposition that a claim created prior to the receivership can never be given preference unless it arises in immediate connection with the *operation and conduct of the business and is of such nature as to be chargeable to the current account*. No expenditure is considered of this nature where it is made for purposes of making *permanent additions or improvements* to the property or where it is of an *unusual or extraordinary* character and not chargeable to the current account. *Even equipment, if supplied in an unusual quantity or under conditions not absolutely requiring it, is not chargeable to the current income, and hence cannot be preferred*” (p. 1588). (Italics ours.)

In the light of the foregoing authorities, let us now analyze the record in the case at bar, in order to determine whether or not the claims of John A. Roeb-ling's Sons Company and I. P. Morris Company, can properly be characterized as debts incurred in the ordinary course of business, and in connection with the day to day operation of the defendant company, and, therefore, properly chargeable to current operating

expense, or whether they are not rather debts incurred in connection with new construction, extensions and extraordinary improvements which could only be properly charged to capital account.

### A.

#### **The Nature and Purpose of Material Furnished by John A. Roebling's Sons Company.**

The following facts appear from the record: That the material furnished by this claimant consisted of approximately ninety miles of copper cable (Tr. 119) for transmitting power, of the value of \$38,577.17 (Tr. 33). That at the time this material was furnished, the Railway Company was engaged in the construction of a new transmission line, approximating thirty miles in length, from its central station at Swan Falls to a pumping plant of the Gem irrigation district, together with a branch extension, four miles in length, from about the middle of the main transmission line to a station known as the "Guffey" pumping station; prior to that time there had been no transmission line between these points (Tr. 44). That the line was constructed directly from the central station to the new points of use, and did not branch from any pre-existing lines (Tr. 45). That this new line was being built for the purpose of serving irrigation customers with whom contracts had been made by *another* company known as the Idaho-Oregon Light and Power Company, in whose stock the defendant company owned the controlling interest. That in order to fulfill its contracts,

the *Idaho-Oregon* Company was then building *extensions* from its existing system to various points of from one to five or six miles in length, and the defendant company was furnishing material to the Idaho-Oregon Company under an agreement termed an "Equipment Trust" (Tr. 46).

The exact uses to which all of the copper wire was put are set forth in the transcript of the record at pages 46 to 49, and therefore need not be repeated in detail. They are tersely summarized in the opinion of Judge Dietrich as follows:

"As disclosed by the stipulation, wire to the amount of \$91.82 was used for the Swan Falls construction, \$26,817.56 for the new Gem and Guffey transmission lines, \$1,121.15 for service lines at Eagle, and \$10,546.64 for the Idaho-Oregon Light and Power Company" (Tr. 138).

The defendant company owned altogether in the neighborhood of something over 100 miles of transmission lines in all (Tr. 120). By transmission lines, of course, is meant lines for the transmission of power as distinguished from lines used for trolley purposes. The wire used for transmission purpose is not serviceable for trolley purposes (Tr. 121). According to the testimony of Mr. Markus, the manager of the Railway Company and subsequently the receiver, who was called as a witness by trial counsel for the claimants, the construction of the Gem line and branch extension for which the I. P. Morris Company copper cable was used, must have represented an addition of at least thirty per cent.



to the total transmission line owned by the defendant company. Mr. Markhus stated that the Roebling Company furnished ninety miles of cable, and as the proportion of cable to mileage was generally three to one, it is apparent that the claimants furnished enough copper wire to construct this thirty miles of new transmission line. Outside of wire used in construction of the new Gem line the balance of the material furnished represented wire supplied by the defendant company to the Idaho-Oregon Company to construct *new and additional* service extensions by that company. As above stated, this material was furnished under an Equipment Trust agreement, whereby the Railway Company reserved title to the supplies and material furnished until paid for (Tr. 46).

There remains but one item of any, but trifling importance, and that is 40,440-Q for \$1,121.15 (Tr. 48). The stipulation of facts states this material was furnished "for use in connection with general service extensions of the Railway Company and its distributing system in and around the unincorporated village of Eagle in Ada County, Idaho." It is to be presumed from the words "service extensions" that the defendant company was at the time engaged in new construction and extending its service to that village. Under any circumstances, however, the burden of proof was upon the claimants to establish that this was an operating expense, and, therefore, we assume that the finding of Judge Dietrich that

“While the precise nature of the extension work at Eagle is not fully disclosed, it is thought that the facts shown are insufficient to warrant a finding that this item of \$1,121.15 was an operating expense” (Tr. 139).

will be regarded by this Court as conclusive.

To summarize the Roebling claim, therefore, it appears that the great bulk of it is for copper cable or wire, by means of which the defendant was enabled to construct an entirely *new* transmission line, representing a great *increase* in its transmission line mileage, into an entirely *new* territory. The balance represented material not used at all in its own business but furnished to *another* company. With regard to the latter, the language used by Judge Dietrich in rejecting the similar claim for preference of the American Steel and Wire Company and to be found at page 141 of the transcript of the record, is pertinent:

“Preference for that which went to the *Idaho-Oregon* Company must be denied because it in no wise constituted an operating expense of the *Railway* Company, or a current debt contracted in the ordinary course of the business of that company. Surely the loaning of its credit to the *Idaho-Oregon* Company *was not in the ordinary course of the business of the Railway Company*. The fact that it owned most of the stock of that company and some of its bonds is not controlling. *The stock may have been wholly worthless*, and hence no substantial part of the security of the *Railway* bondholders, and its interest in the bonds may have been relatively unimportant. The case of *Southern Railway*

*Co. v. Carnegie Steel Co.*, 176 U. S., 257, relied upon with apparent confidence by the claimant, is readily distinguishable, as is made manifest by this simple sentence quoted from the opinion: 'The rights of the Carnegie Company, the claimant, are none the less because the Danville Company (the purchaser) chose, after obtaining the rails, to use a part of them on roads under its control and in its possession, and whose preservation in proper condition was vital to its successful operation.' If we assume that because it was the dominant stockholder the Railway Company had possession of and controlled the property of the Idaho-Oregon Company, it would be going far beyond the facts to say that the maintenance of the Idaho-Oregon plant in proper condition was vital to the successful operation of the Railway Company's system or any part thereof. While the relations of the two systems were such that there were common and mutual interests, the accruing benefits from the use of this material are too remote and contingent to serve as a basis for the application of the rule invoked." (pp. 141, 142.)

That the stock of the Idaho-Oregon Company is worthless, as above suggested by Judge Dietrich, may be assumed from the fact that that Company, too, went into the hands of a receiver (Tr. 145). See also testimony of Mr. Fuller to the effect that the syndicate regarded its investment in the Idaho-Oregon property "of very questionable value, and we as a syndicate, determined to wipe it off" (Tr., p. 132).

Judge Dietrich might well have cited to sustain his reasoning the case of *Southern Ry. Co. v. Ensign Mfg.*

*Co.*, 117 Fed., 417, decided by the Circuit Court of Appeals, Fourth Circuit. The opinion of the court in that case is well worth reading on the whole question of equitable preferences of material and supply claims (see pp. 420, 421). The importance of the case as bearing upon the "equipment trust" question, however, is illustrated by the concluding sentence in the opinion (*id.*, p. 424) :

"Although the contract was made with the Richmond & Danville Railroad Company (the mortgagor company), and the Ensign Manufacturing Company (the claimant) is a creditor thereunder, against this company, yet, as the goods were purchased for and were used by another company, no equity exists, as against the mortgagees of the Richmond & Danville, giving the claim priority over them."

Furthermore, even if we assume (in direct opposition to the finding of the learned judge who had charge of and was thoroughly familiar with every phase of this entire situation) that the defendant company and the Idaho-Oregon Power Company were practically one and the same, nevertheless, the claimant's position is not improved. This is true because it is apparent that this wire was used even by the *Idaho-Oregon Company* not for *repair* or *operating* purposes of any kind, but in connection with the *construction* by the latter company of a number of *new* extensions. (Tr. 46) for the purpose of *increasing* the scope of its business, and was not essential or necessary in order to *preserve* or keep intact the business which it had been conducting *prior* to that time.



The general character of the debt of the claimants cannot be better described than in the following language of Judge Dietrich:

*“But surely there is no semblance of reason for holding that the extension of a long transmission line into a new territory and the installation of a new distributing system where there has been none before constitute expenses of operation.”* (Tr., 139.)

But this appellant will urge upon the court, as it did below, certain general language in the stipulation of facts in order to supply, if possible, this manifest deficiency in its case.

It is true that the solicitor for the receiver stipulated in the court below that the intervener sold said materials “in the belief and in the intention, *on the intervener’s part*, that the same should be paid out of the current operating income” (Tr. 43).

It is to be noted, however, that the intention stipulated was solely that of the *intervener*—there is nothing in the record to justify either a finding of fact or even a *belief* that the *Railway Company* had any such intention. There is no proof to show that the debt was charged by the *railway company* to operating expense, although Mr. Markhus, the manager of the railway company, and subsequently the receiver, was placed upon the stand by the claimants. Evidently he was regarded by them as an impartial witness, to say the least, not only because they called him, but also because the stipulation of facts was based upon data fur-

nished by him (Tr. 115). The claimants had every opportunity to question this witness as to his intention with respect to the payment of these claims, but they did not see fit to do so. Under the circumstances, it must be presumed that if such a question had been put, the answer would have been unfavorable to them.

On the other hand, Mr. Markhus *did* testify that the occasion for placing the Roebling order was the "building and early completion of the Swan Falls-Gem transmission lines" (Tr., 117), and also that the dealings of the company were directly with the representative of the Roebling Company, and "he, no doubt, was made acquainted with where the wire was going and the purpose for which it was to be used in the construction of the Swan Falls-Gem District extension" (Tr., 119).

Assuming, however, what is difficult to believe, that the Roebling Company, although familiar with the purposes for which the purchased material was to be used, nevertheless believed and intended that the same should be paid for out of current operating income, the absence of any proof that such was also the intention of the *purchaser*, is fatal to the claimant's right for equitable preference:

This very court has recently held:

"The real basis upon which the preference rests is thought to be the implied understanding on the part of *all* parties that such debts are to be paid out of the current income before the mortgagee has any claim thereto."

*Moore v. Donahoo*, 217 Fed. (9th C.) 177 at 184. (Italics ours.)

To the same effect see *Southern Railway Company v. Carnegie Steel Company*, 176 U. S., at page 290, where the court uses the following language:

“We next inquire whether it was not at the time the expectation of *both* parties, *vendor* and *vendee*, that the rails delivered by the Carnegie Company between July 25, 1891 and October 10, 1891, should be paid for out of the current earnings of the railroad company.” (Italics ours.)

Counsel for the claimants, however, has also seized upon the sentence at the end of the stipulation (Tr., 49) to the effect that:

“said material is and was necessary to the continued maintenance and operation of the respective parts of said property for which the same was supplied, and in which it is used.”

As to this, it is a sufficient answer to quote from the language of Judge Dietrich in his opinion below:

“It is this last clause, namely, ‘and said material is and was necessary,’ etc., upon which the intervenor relies. But even when taken alone this language does not signify that the wire was used for the purpose of repair or replacement, or that it was necessary to keep the plant a going concern. It is, of course necessary to the maintenance and operation of *those new parts of the system for the construction of which it was used, and that is all*. Any other view would be directly in the face of the concrete facts disclosed by other parts of the stipulation. The material so far as used by the Railway

Company was employed not in repairing its existing system, but in *enlarging it*. Clearly such expenses are chargeable *not* to operation or maintenance, but to *construction*" (Tr. 138, 139). (*Italics ours.*)

We might also call attention to the fact that it was only stipulated that the material was necessary to the continued maintenance and operative of the respective parts of the property "*for which the same WAS supplied, or in which it IS used.*"

The material *was* supplied for the construction of an entirely *new* and important addition to the defendant company's power properties. It *is* used solely in connection with that self-same addition. Counsel for the appellants in his summary at the end of his brief says that it is admitted by the agreed statement or by the uncontradicted evidence that

"the material and supplies *were* necessary to the continued maintenance and operation of the Railway Company's property."

If he means the court to understand that it is admitted or has been proved that without the material in question the Railway Company could not have continued to operate, we differ with him. Of course, the material furnished was necessary to the maintenance and operation of the new Swan-Falls-Gem District line, because without it or similar material that line could not have been built. But the line was an entirely *new* line.

There is, of course, nothing in the record to show that the defendant company's business which it had



been conducting prior to this new construction work, could not have been fully maintained and operated without the use of one single *foot* of the wire furnished by the claimant.

## B.

### **The Nature and Purpose of Material Furnished by I. P. Morris Company.**

In the Fall of 1912 and prior to October 31st, of that year, the Railway Company determined "to *improve, enlarge* and in part *rebuild*" the Swan Falls power plant, by removing three 300 K. W. generating units and replacing same by two 1250 K. W. generating units, with the necessary foundation, wheel pits, gates and tail races, all so arranged and placed that two additional 1250 K. W. could be installed in the future (Tr., 68).

The Railway Company accordingly entered into an elaborate contract on October 31st, with the I. P. Morris Company for the designing, construction, delivery and installation of the machinery necessary to so enlarge and reconstruct the Swan Falls plant, at a total cost, including extras, of \$48,335.37. The main items of the machinery were to be delivered in installments covering a period extending up to April 1st, 1913, and the spare parts were to be delivered within one year from the date of the contract, subject to prior delivery upon three months' notice (Tr., p. 77). The contract also provided for tests of operation after installation (Tr., p. 84), and for rejection if the machinery failed to develop a certain specified efficiency (Tr., p. 79).

The contractor agreed to furnish an Erecting Superintendent, who was to arrive at the purchaser's powerhouse simultaneously with the arrival of the first main unit and was to remain there, at an expense to the purchaser of \$10 a day plus all traveling and living expenses, to superintend the erection of all of the machinery to be furnished by the contractor, which necessarily under the terms of the contract would cover a period of several months (Tr., p. 83).

It was stipulated that "*the enlargement and improvement* made at the Swan Falls plant under the Morris contract was for the purpose of putting the Railway Company in a condition to *better* serve its customers and to supply the *increasing* demand for electric current." (Tr., p. 69.) By putting together the stipulation in respect to the Roebling claim and the stipulation in respect to the Morris claim it is apparent that the machinery which the I. P. Morris Company was to furnish was purchased for the purpose of generating the necessary increased power required to be transmitted over the thirty mile new transmission line for which the Roebling Company was supplying copper cable. (See Tr., pp. 44 and 45.) We quote from the latter page as follows:

"That this line (the new Gem transmission line), then under construction, was constructed from the Swan Falls station for the purpose of serving irrigation customers with whom contracts had been made having a present estimated demand of about 2,000 H. P. and an ultimate estimated demand of about 6,000 H. P. *That these contracts were made*

*with a view to utilizing the increased capacity of the Swan Falls central station as thus enlarged."*

The capacity of the aforesaid three generating units of the Swan Falls power plant prior to its reconstruction was only 900 K. W. The capacity of the two new generating units supplied by the I. P. Morris Company was 2500 K. W. (Tr., p. 68) and in addition the Morris Company supplied the necessary foundation, wheel pits, gates and tail races, so arranged that two additional 1250 K. W. generating units could be installed in the future (Tr., p. 68). Thus there was an immediate increase in the generating capacity of the plant of 1600 K. W. The total rate reliable capacity of the Swan Falls plant is 4200 K. W., of which 2500 K. W., is generated by the Morris machinery.

*In other words, the machinery furnished by the I. P. Morris Company and for which it claims a preference on the ground that its debt is merely one for ordinary operating expense, generates 60 per cent. of the entire power of the Swan Falls plant, which is the only power plant owned and operated directly by the defendant company (Tr., p. 70).*

If under such circumstances the I. P. Morris claim can be characterized as an ordinary daily operating expense then we can hardly conceive of a claim for *any* kind of material furnished to a railroad company for any purpose whatsoever which might not be deemed to come within the same category.

The material was not even for *replacement* purposes. The substituted units represented an increase in capacity of approximately 177 per cent. over the total ca-

capacity of the units displaced and when installed produced 60 per cent. of the entire power of the plant as a whole.

But this appellant will also urge upon the Court that portion of the stipulation of facts which states that "such machinery *is* necessary to the continued operation of the Railway Company's system and that without it it *could* not perform its duties to the public." (Tr., p. 72.) It is to be noted that the stipulation does not state that such machinery *prior* to its installation was necessary to the continued operation of the system or that without it could not *then* have performed its duties to the public. Of course, such machinery once installed is *now* necessary to the continued operation of the power system of which it has become an integral part, but there is not a word in the record to justify even the supposition that it *was* necessary *prior* to such installation.

Furthermore there is no proof that the machinery in operation prior to the installation of the Morris machinery, was in any way defective or out of repair or that the defendant company could not have gone right along supplying its customers as it had before. It *does* appear, however, that the defendant company was desirous of *enlarging* its capacity and its scope of service, obviously with the purpose of *increasing* its revenue.

Surely, however, this is work of *new* construction, the expense of which is properly chargeable only to capital account.



To maintain that such enlargements are a part of ordinary *operating* expense is contrary to all business experience and common sense.

There is a further clause in the stipulation to the effect "that said material was furnished and work performed by Morris for the Railway Company in the belief and intention that the same, *unless otherwise provided for by the Railway Company* would be paid for out of the operating or current income thereof." (Tr. pp. 72 and 73.)

The qualifying clause "unless otherwise provided for" of course renders this part of the stipulation nugatory so far as the claimant is concerned.

Indeed it actually suggests that the claimant expected that payment *would* be otherwise provided for by the Railway Company.

We also desire to call attention to the fact that the contract for the construction and installation of this machinery was entered into approximately *fourteen months* prior to the appointment of the Receiver; that under its terms the final balance of the purchase price was not to be paid until one hundred and twenty days after the receipt of the apparatus at destination (Tr., p. 87), that the work was not finally completed until the latter part of September, 1913, eleven months after the making of the contract, and was not formally accepted by the defendant company until December 9th, 1913 (Tr., p. 69); that on the date last mentioned the Railway Company paid to the claimant \$21,200.66 and gave two promissory notes

each for the sum of \$13,246.58, for the balance, one due in three months and the other in six months after said date.

Under these circumstances it is not surprising that Judge Dietrich in the Court below expressed himself upon this aspect of the claimant's case in the following forceful language:

"In view of all these conditions, it is quite incredible that this claimant or any of the claimants having knowledge of the plans of the Railway Company could have expected that this entire expense would be taken care of out of current receipts." (Transcript, pp. 144 and 145.)

See also

*Bound v. South Carolina Ry Co.*, (C. C. A.)  
58 Fed. 473, at p. 480.

### **What are Current Expenses of Operation as Defined by the Decisions of the Various District, Circuit and Circuit Courts of Appeal?**

We have heretofore discussed the general principle developed by the decisions of the Supreme Court of the United States to the effect that only debts which may be properly qualified as current operating expenses may be treated as preferential. An analysis of the decisions of the various district circuit and circuit courts of appeals construing the opinions of the United States Supreme Court and applying them to the claims immediately before them, will demonstrate beyond ques-

tion that the claims before this court are wholly outside of the favored class.

One of the earliest cases is *Reyburn v. Consumers' Gas, Fuel & Light Company*, 29 Fed. 561, decided in 1887. There the claimant intervened in a foreclosure suit against an insolvent gas company, and contended this his claim for gas meters furnished to the company was entitled to a preference. It seems to have been conceded that income had been diverted by the receiver to the improvement and extension of the works and plants of the company. The opinion of Judge Blodgett, in denying the preference, is directly in point on the question of what is operating expense and what is construction. He held as follows:

"I do not concur with the learned counsel who appeared for this creditor in their position that the goods furnished come under the definition of 'operating supplies.' The debt was wholly contracted for gas-meters, which were a part of the gas-works of the company, and as much required for the complete and operative construction of the works as any other part of the plant or machinery of the works. It is impossible, as the proof shows, for the gas company to sell gas without meters, with which to measure and distribute it to their customers, and from which the accounts are to be made up and the bills collected. It seems to me that it requires meters to make the works of a gas company complete, as much as pipes and generators, and no gas-works can be said to be in operating condition unless they have an adequate supply of meters. The claim, therefore, comes within the definition of a claim for material furnished for the construction of

the works; and from the decision of the Supreme Court of the United States in *Fosdick v. Schall*, 99 U. S. 235, down to the present time, I have seen no case which contemplates, except under very peculiar circumstances, that general creditors who have furnished mere material for the *construction* of works of this character are to have a lien, as against the lien of mortgages. The doctrine of *Fosdick v. Schall*, and the subsequent cases on the same question, is that, for the purpose of keeping works of a public character in operation, those who have given the company credit for the supplies necessary to keep the works in operation—current operating supplies—are to have a lien extending back not to exceed six months, except under extraordinary circumstances; but I do not understand that this rule has ever been applied to cases of creditors who have simply furnished material for the construction of the works, in contradistinction to operating material. *The material for the building or construction of the works, in theory, at least, is supposed to be paid for out of the capital stock, or bonds secured by the mortgage upon the property.*" Id. 563, 564. (Italics ours.)

If a claim founded upon a sale of gas meters to a gas company cannot properly be considered a part of the current operating expense of that company, how can a claim for ninety miles of copper cable furnished for the construction of a new transmission line, or a claim for valuable and important machinery used in the reconstruction of an electric power plant and representing 60 per cent. of its total generating power be possibly considered as current operating expense?



In *California Safe Deposit & Trust Co. vs. Yakima Inv. Co.*, 82 Fed. 542, the question was fully considered by Judge Hanford, sitting in this Circuit. The claim before the court in that case was for services in the construction of lateral ditches extended from time to time, as required in the actual operation of conducting water to the different tracts of land to be irrigated by an irrigation company. Judge Hanford held as follows:

“The services of the petitioner Owens, for which compensation is due, were all performed in the original construction of the defendant’s irrigating works. In the case of McLean, only a trifling amount of \$2.20 of his claim is for labor performed in work that may be denominated operation. *An attempt was made by counsel, in the argument, to make a distinction between the construction of lateral ditches from the main canals, on the ground that the laterals are extended from time to time, as required in the actual operation of conducting water to the tracts to be irrigated.* But in the light of the authorities I must hold that the difference is not sufficient to distinguish the case from other cases in which the general rule has been limited in its application so as to *exclude debts for the cost of original construction.* In the case of *Railroad Co. v. Hamilton*, 134 U. S. 296-306, 10 Sup. Ct. 546, 547, the supreme court of the United States, in its opinion by Mr. Justice Brewer, held emphatically that: “A recorded mortgage, given by a railroad company on its roadbed and other property, creates a lien, whose priority cannot be displaced thereafter

directly by a mortgage given by the company, nor indirectly by a contract between the company and a third party for the erection of buildings or other works of original construction.' The facts of that case afford ground for contending with quite as much reason as in the case now under consideration that the labor for which compensation was claimed should be classed as work necessary in operation, *but in the opinion of the court words seem to have been carefully selected to include all structures and additions made after the road had been put in operation in the same category as the original main line of railway*, and the broad rule laid down in the sentence above quoted is just as applicable to this case as to the one in which the decision was made. I rest my decision upon the authority of that case." *Id.* 544, 545. (Italics ours.)

If the claimant argues that the construction of the Gem transmission line and the building by the *Idaho-Oregon* Company of additional extensions and the increase in the capacity of the power plant were merely *incidental* to pre-existing operations of the defendant company and the Idaho-Oregon Company respectively, the language of Judge Hanford above italicized is particularly pertinent in refutation of that argument.

In no one of the circuits has the question of the practical application of the rule to be adduced from the decisions of the Supreme Court received greater attention than in the Eighth. The leading case in that circuit is *Doud v. Illinois Trust and Savings Bank*, 105 Fed. 123, which it is to be noted, was decided before *Gregg v. Metropolitan Trust Company*, 197 U.

S. 183, which is the last important decision of the Supreme Court on the general question of equitable preference, and which so plainly evidences the modern tendency of that court to restrict the doctrine in question.

In the *Doud* case the intervener made a loan to an electric light company to construct an addition to its power plant so that its available power would be raised from 600 to 1000 horse power. He claimed a preference on the ground that the construction was necessary to keep the railway company a going concern.

The same question was raised which is raised here, as to whether or not the expense of constructing the additional power plant involving the purchase of new machinery at an expense of \$19,000, and which increased the available power of the plant 66-2/3 per cent. could be held a current operating expense incurred in the ordinary course of business. The court answered the question emphatically in the negative and held that the work for which the money was loaned was a work of *construction and enlargement* and *not* a work of operation.

The Court then considered the question as to whether claims arising out of the carrying on of work of *construction* were entitled to a lien on the mortgaged property, and its income superior to that of the prior mortgagee. In order to answer that question Judge Sandborn reviewed fully all of the important decisions of the Supreme Court of the United States which had been decided up to that time, including the cases of *Southern Railway Company v. Carnegie Steel Co.*,

176 U. S. 257, and *Lackawanna Coal and Iron Company vs. Farmers Loan and Trust Company*, 176 U. S., 298, and then held as follows:

“The authorities to which we have now adverted establish the propositions that a claim for money borrowed or for service rendered or material furnished to construct a *necessary, permanent, and beneficial improvement or addition* to the mortgaged property of a quasi public corporation is *not* entitled in equity to a preference in payment out of the mortgaged property or income over the claims of the bondholders secured by the lien of the prior mortgage, in the face of which the claim accrued; and that neither the fact that the consideration of the claim conserved the property, increased the security of the mortgagee, and rendered the operation of the property more economical, *nor the fact that it was necessary to keep the mortgagor a going concern*, nor the fact that the mortgagor pledged or mortgaged the current income to secure the payment of the claim; can raise such an equity as will entitle it to a preferential lien upon either the income or the corpus of the mortgaged estate over the lien of the prior mortgage. These propositions conclusively answer the question presented in this case.” *Id.* 142-143. (*Italics ours.*)

The court then referred to the fact that as usual in cases of claims for preferential liens in equity, the case of *Fosdick vs. Schall* (*supra*) had been cited, quoted, and made the foundation for the argument for the intervener. After quoting from the opinion of Chief Justice Waite in that case, Judge Sandborn held as follows:



“But it is an interesting fact that these remarks upon which so many arguments are based for the preference of unsecured to secured creditors in the application of the income and proceeds of mortgaged property, were obiter dicta, and that the supreme court has ever since they were delivered been industriously engaged in limiting their terms and restricting their effect, until it has finally declared in the cases of *Southern R. Co. v. Carnegie Steel Co.*, and *Lackawanna Iron and Coal Co. v. Farmers Loan and Trust Co.*, supra, that no claim which is not a current debt incurred in the ordinary course of the operation of the property of the mortgagor can be allowed a preference in payment over the lien of the prior mortgage.” *Id.* 143. (Italics ours.)

Finally the court laid down its fundamental deductions from an exhaustive examination and analysis of all of the previous cases upon the subject of preferential claims in the following clear and authoritative language, which has since been the subject of so much quotation in later decisions:

“When a careful examination and analysis of the facts and opinions in all the cases in the supreme court upon the subject of preferential claims in suits to foreclose mortgages of quasi public corporations is made, and dicta are distinguished from adjudications, the decisions of that court will be found to sustain these propositions: A mortgagee of the property, acquired and to be acquired, and of the income of a quasi public corporation, such as a railroad company, obtains a lien upon the net income of the company after the current expenses of operation incurred in the ordinary course of busi-

ness are paid, and impliedly agrees that the gross income shall be first applied to the payment of these current expenses, before the net income to which he is entitled arises. A court of equity engaged in administering mortgaged railroad property under a receivership in a foreclosure suit may prefer unpaid claims for *current* expenses of the ordinary operation of the railroad, incurred within a *limited* time before the receivership, to a prior mortgage lien, in the distribution of the income or of the proceeds of the mortgaged property. If such a mortgagor diverts the *current* income from the payment of *current* expenses to the payment of interest on the mortgage debt, or to the improvement of the mortgaged property, so that current expenses remain unpaid when a receiver is appointed, the Court may, out of the income accruing during the receivership, restore to the unpaid claims for current expenses the amount so diverted. But if there has been no diversion there can be no restoration, and the amount of the restoration cannot exceed the amount of the diversion. The class of claims which may be awarded a preference in payment over the prior mortgage debt in equity *is limited to claims for current expenses incurred in the ordinary course of the operation of the mortgaged property within a limited time before the appointment of a receiver.* It does not include claims for money loaned, or for material or labor furnished to make necessary beneficial and permanent additions or improvements to the mortgaged property. The broad language of the dicta in *Fosdick vs. Schall*, that 'necessary operating and managing expenses, proper equipment, and useful improvements' are to be deducted from the current income before the net income out of

which the mortgage debt is to be paid arises, has been disapproved and modified, and the class of claims entitled to equitable preference has been limited, by the later decisions of the Supreme Court in *Kneeland v. Trust Co.*, 136 U. S., 89, 98, 10 Sup. Ct., 950, 34 L. Ed., 379; *Morgan's L. and T. R. and S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S., 171, 196, 198, 11 Sup. Ct., 71, 34 L. Ed., 625; *Thompson v. Railroad Co.*, 132 U. S., 68, 71, 73, 10 Sup. Ct., 29, 33 L. Ed., 256; *Thomas v. Car Co.*, 149 U. S., 95, 110, 13 Sup. Ct., 824, 37 L. Ed., 663; *Southern R. Co. v. Carnegie Steel Co.*, 176 U. S., 257, 296, 20 Sup. Ct., 347, 44 L. Ed., 458; and *Lackawanna Iron and Coal Co. v. Farmers' Loan and Trust Co.*, 176 U. S., 298, 315, 20 Sup. Ct., 363, 44 L. Ed., 475—to claims incurred for the current expenses of the operation of the mortgaged property in the ordinary course of the business of the mortgagor. The test of the preferential equity of a claim is its consideration. If its consideration was a current expense of the operation of the mortgaged property, which inured to its benefit, and which was incurred in the ordinary course of its business, within a limited time anterior to the appointment of the receiver, the claim may be preferred. \* \* \* If the consideration of a claim is not a part of the current expenses of the ordinary operation of the mortgaged property, but is a part of the expenses of constructing a permanent addition or improvement to it, out of the ordinary course of its operation, neither the fact that it tended to conserve and improve the property and increase the security of the mortgagee, nor the fact that it was necessary to keep the mortgagor a going concern, nor the fact that the mortgagor

*pledged or mortgaged the current income to secure it, will give the claim a preferential equity over the lien of a prior mortgage"* (id., pp. 148-149). (Italics ours.)

In the case of *Rhode Island Locomotive Works v. Continental Trust Co.* (108 Fed., 5), the consideration for the claim was twelve locomotives. A strong Circuit Court of Appeals, composed of Judges Lurton, Day and Severens, denied the preference holding that, "The most that can be said to justify so large a purchase of additional equipment is that it was necessary to *the enlargement of the capacity* of the railroad company to conduct its traffic" (id., p. 7).

Exactly the same language might be applied to the claims at bar.

It is true that the Court in the case last cited also found that there had been no diversion of current earnings, but this was merely an additional ground for denying the claim and detracts nothing from the force of the Court's opinion on the ground first stated.

In the case of *Niles Tool Works v. Louisville, N. A. and C. Ry. Co.* (112 Fed., 561), the claim was for the price of three boilers sold by the claimant to a mortgagor railroad company, and used by the latter in connection with the construction of shops owned by a second company under a contract whereby the mortgagor company acquired the use of same by lease. After discussing the doctrine of *Fosdick v. Schall* (supra), the Court held as follows:

"Since that opinion, however the rule has become



firmly established that indebtedness contracted by the mortgagor for improvements which are work of original construction and not mere repairs cannot displace the mortgage liens, though the mortgaged property is thereby improved" (id., p. 563).

It is also true that in the case last cited there was no diversion of income, but the Court held that *aside* from this the claim did not "come within the limited class of expenditures for which such allowance is authorized" (id., p. 562).

One of the best considered opinions of any Circuit Court of Appeals on this subject is to be found in the case of *Rodger Ballast Car Co. v. Omaha K. C. and E. R. Co.* (154 Fed., 629). In that case the Eastern Railroad Company held a railroad about sixty-eight miles in length, and a lease of the road of the Quincy, Omaha & K. C. Railroad Co., which was about one hundred and thirty-four miles in length. It was operating both of these roads. It had two mortgages covering its own railroad, and its lease of the Quincy road. The operation of the latter road was essential to the successful operation and business of the Eastern road. In the year 1899, both roads were in bad condition, particularly the Quincy road; portions of its roadbed had been only partially ballasted, the sides of the roadbed were washed, many of the cuts upon the road were badly filled, some of the ties were decayed and some of the bridges had become dangerous—"so that it was necessary to the safe operation of these roads and to the continuance of the business of the Eastern Company that many miles of this roadbed should be re-

ballasted and surfaced" (id, p. 631). So serious was the condition of the road that the Board of Railway and Warehouse Commissioners of the State of Missouri, in August, 1899, issued a *peremptory order* to the Eastern Company, under a possible penalty of the suspension of all traffic upon its roads, that this condition should be remedied. Ballast cars were necessary to the performance of this work, and in September, 1899, the Eastern R. R. bought of the plaintiff thirty-two ballast cars and one plow car for the sum of approximately \$26,000, which it never paid. Within less than four months thereafter, Receivers of the road were appointed, who took possession of the ballast cars, operated the railroads and ballasted and resurfaced the Quincy road.

The opinion of the Court is based squarely upon the question as to whether or not the expense of these ballast cars was a current expense of the operation of the Railroad Company's business. The Court first referred to and quoted from at length *Illinois Trust and Savings Bank v. Doud* (105 Fed., 123), which we have cited above. It then held as follows (p. 632) :

"An examination of the opinions of the Supreme Court upon this subject since the decision in the *Doud* case was rendered discloses no modification of these propositions of law, *save that the class of claims which may be preferred has been still farther restricted by the holding in Gregg v. Metropolitan Trust Co.*, 197 U. S., 183, 25 Sup. Ct., 415." \* \* \* (Italics ours.)

It then assumed for the purposes of its decision the

very facts which the claimants in this case contend are conceded by stipulation, and upon which they lay such stress, in the following language:

“For the purposes of this decision the concession is made that the purchase of the ballast cars was *necessary to keep the Eastern Company a going concern and to continue its business and operation*, and that their purchase conserved and improved the mortgaged property and increased the security of the bondholders secured by the mortgages. But neither the fact that the consideration of a claim preserved and improved the mortgaged property and increased the security of the mortgagees, *nor the fact that it was indispensable to keep the mortgagor a going concern and to continue its operation and business, will give to the claim a preferential equity over the lien of creditors secured by a prior mortgage. Illinois Trust and Saving Bank v. Doud*, 44 C. C. A., 415, 105 Fed., 149, 52 L. R. A., 481; *Atlantic Trust Co. v. Dana*, 128 Fed., 209, 227, 62 C. C. A., 657, 675. There is *another* indispensable attribute of a preferential claim. It is that its consideration was a *current expense of the operation of the mortgagor incurred in the ordinary course of its business within a limited time, usually six months, anterior to the appointment of the receiver*” (id., p. 632). (Italics ours.)

After reviewing the *Carnegie Steel* and *Lackawanna* cases, referred to supra, the Court further held as follows:

“A current expense incurred in the ordinary course of business within six months prior to a

receivership is a *usual* expense incurred in the *customary* course of the business of the company. The evidence in this case fails to convince that the purchase of these thirty-three cars for \$26,192.05 by a railroad company operating 168 miles of railroad was the incurring of such an expense. *There was no evidence that the company had ever bought such a lot of cars before, or that in the ordinary course of its business it was accustomed to purchase such a lot once in three months or in six months or in any specific number of months, as a part of the current expenses of its operation*" (id., p. 633). (Italics ours.)

So in the case at bar the evidence fails to convince (a) that the purchase at an expense of over \$38,000 of 90 miles of copper cable to be used over 30 miles of new transmission line, representing approximately 30 per cent. of the total power transmission line owned by the company; or (b) that the purchase of over \$48,000 worth of new machinery which generates approximately 60 per cent. of the total power generated by the one power plant directly owned and operated by the defendant company, is the incurring of a "*usual expense* incurred in the *customary* course of the business of the company." Nor is there in the case at bar, any more than there was in the case last cited, any evidence that the defendant company had ever bought such a lot of copper cable or machinery before, "or that in the ordinary course of its business it was customary to purchase such a lot once in three months or in six months or in any specific number of months, as a part of the current expenses of its operation."



In the case of *Central Trust Co. v. Colorado Light and Power Co.* (200 Fed., 85), the intervener claimed a preference for repairs made to certain new boilers. When erected they were not designed for immediate use, but apparently intended ultimately to supplement the power at defendant's plant. The Court held as follows (*id.*, p. 89):

"It may be assumed, therefore, that the boilers, when repaired, *would conduce to the greater efficiency of the plant*, and thus, as repaired, made the Trust Company's mortgage to that extent more amply secured. *But the repairs were in no sense current expenses of the defendant, nor incidental to the ordinary operation of the plant. They were designed to its extension and enlargement, and were thus in the nature of betterments, looking toward a more adequate plant.*" (Italics ours.)

It is true that there was no diversion of income proved but we cite the case as an apt illustration of what may *not* be properly considered a current operating expense. As in the case at bar the new boilers were designed to the "extension and enlargement" of the plant. This immediately removed the claim based thereon from the class of current operating expenses.

One of the latest cases on this point decided by the Circuit Court of Appeals for the Eighth Circuit, in a decision handed down in December, 1915, has clearly and forcibly summarized the modern doctrine with respect to the classes of claims which are allowed preference as follows:

“The class of claims which under the decisions of the Supreme Court may lawfully receive an equitable preference in payment out of the income or out of the corpus of the property of a mortgaged railroad over the bondholders secured by a prior mortgage is limited to *claims incurred for the current expenses of the ordinary operation of the mortgaged property in the usual course of the business of the mortgagor. The test of the preferential equity of a claim is its consideration.* If its consideration was a *current expense* of the *ordinary* operation of the property of the mortgagor incurred in the *usual* course of its business, for labor, supplies, and like things, necessary for the operation of the railroad, within a limited time, usually not exceeding six months anterior to the appointment of the receiver, the claim may be preferred in payment, *otherwise it may not be.*” (Italics ours.)

*Love v. North American Co.*, 229 Fed., 103,  
at page 107;

See also

*Atlantic Trust Co. v. Dana*, 128 Fed., 209,  
at page 226;

*Lee v. Penn Traction Co.*, 105 Fed., 405, at  
pages 406, 407.

### Cases Decided in the Ninth Circuit.

We have reserved for separate discussion the decisions of the Federal Courts of the Ninth Circuit, touching upon this subject, namely:

*Atlantic Trust Co. v. Woodbridge C. and J. Co.*, 79 Fed., 39;  
*California S. D. and T. Co. v. Yakima Inv. Co.*, 82 Fed., 542;  
*New York G. and I. Co. v. Tacoma R. and N. Co.*, 83 Fed., 365;  
*Spencer v. Taylor Creek Ditch Co.*, 194 Fed., 635.

In *Atlantic Trust Co. vs. Woodbridge Canal and Irrigation Company*, 79 Fed., 39, the claimant was a laborer who filed a petition alleging that the defendant company was indebted to him in the sum of \$278 for work and labor done by the petitioner "in the construction, alteration, addition to, repair and supervision of its said ditches and canals as a laborer at its request." A demurrer was filed to the petition. Judge McKenna, after reviewing such of the cases on the question of preferential claims as had been decided prior to that time, held as follows:

"In applying the principles which I have enunciated to the case at bar, there is some uncertainty. The allegations of the petition are somewhat confusing. They assign the services to construction, repairs and expenses of operation. *As far as they were for construction, they must be governed by the case of Railway Co. v. Hamilton*, 134 U. S., 296, 10 Sup. Ct., 546, and cannot be given preference. So far as they are for repairs and improvements, they cannot be given preference, as there is no allegation of diversion of income, nor, indeed, of the receipt of any income. So far as they are for operation—keeping the works a going concern

—they are within the principles declared, and may be entitled to preference, even out of the corpus. What the services were actually for, I assume the evidence will show, and then can be determined the class to which they belong” (id., 42). (Italics ours.)

This decision antedated the *Carnegie Steel* and *Lackawanna* cases, also the *Gregg* case, but even so, it clearly draws the distinction between claims for construction and claims arising out of operation.

The next case was that of *California Safe Deposit and Trust Co. vs. Yakima Inv. Co.*, 83 Fed., 542. We have already analyzed and quoted from this case at some length. It again clearly laid down the distinction between construction and operating claims, and held that claims for additions made after the road had been put in operation fell in the same category as claims for construction of the original main line (id. 545). The decision is peculiarly applicable to the services and other extensions for which preference is claimed in the present case.

The next case is that of *New York Guaranty and Indemnity Co. vs. Tacoma Railway and M. Co.*, decided in October, 1897, and reported in 83 Fed., 365. The Court held that a claim for \$620 for a cable rope furnished by the intervener to a street railway company, and which was actually used by the company in the operation of its line for a period of 119 days, and which it was stipulated by all parties was actually necessary for the operation of the road dur-



ing that period of time, was entitled to a preference. The Court bases its decision squarely upon the "going concern" theory, which was eight years later repudiated by the Supreme Court of the United States in the case of *Gregg vs. Metropolitan Trust Company*, 197 U. S., 183. Indeed Justice McKenna's dissenting opinion in the *Gregg* case cites the *New York G. and In. Co. vs. Tacoma R. and M. Co.*, as one of the cases at Circuit, holding contra to the majority decision of the Supreme Court in the *Gregg* case, and presumably, therefore, as having been overruled by the *Gregg* case. However, even in the *Tacoma Railway* case the Court held as follows:

"We do not think, as contended for by counsel for appellants, that the cable can be regarded in the light of repairs, or for construction or improvements, within the sense of the rules laid down by such decisions as *Railway Co. v. Hamilton*, 134 U. S., 296, 10 Sup. Ct., 546; *Thomas v. Car Co.*, 149 U. S., 110, 13 Sup. Ct., 824; and other cases of a like character."

83 Fed., 369.

But the Court, it seems, did not then regard the question as to whether the claim was for operation on the one hand, or improvement or construction on the other hand, as of importance, as is illustrated by its immediately succeeding language:

"The question here is not so much whether the cable involved in this claim for preference is to be regarded in the light of repairs, or for construction, or as an improvement, or in the nature of

materials or supplies furnished; but it depends upon the inquiry whether or not it was necessary to keep the road a 'going concern,' within the meaning of this expression as it is used by the Supreme Court in the cases cited above" (id. 369).

That the Circuit Court of Appeals of this Circuit has since fully recognized that the *Gregg* case once and for all disposed of the "going concern" theory is illustrated by the following excerpt from the recent opinion of this Court in the case of *Moore v. Donahoo*, 217 Fed., 177, where, after quoting from the *Gregg* case, the following language was used:

"If by this language any doubt were possible of the intention of the Court to disapprove of the 'going concern' theory, the dissenting opinion most clearly indicates that it was this precise question upon which there was a division" (id. 181).

Leaving this aside, however, and coming back merely to the question of whether the claim in the case of *New York G. and Ir. Co. v. Tacoma R. and M. Co.* should properly have been classified as construction or operation, let us examine such of the facts in that case as the opinion discloses.

In the first place, the Court says that without this cable rope "this *portion* of the cable railway system could not be operated at all" (id. 368). Presumably, therefore, the rope in question was in use over only a part of the road, and from the fact that the claim was only for \$620, we may safely assume that it was but a *small* part of the road, and that the amount of

rope furnished was comparatively unimportant. There was no question involved in that case, of furnishing 90 miles of copper wire of great value to be used over thirty miles of *new* road then under construction, as is the fact in the case of the Roebling claim, nor was there anything to show that as a result of furnishing the rope the capacity or power of the railway company was vastly increased, as is the fact in the I. P. Morris claim, with respect to the Swan Falls Power plant machinery. For all that appears, the claim was for a comparatively insignificant amount of rope, to replace a portion that had been worn out by use and operation. Under no circumstances, therefore, can the *Tacoma Railway* case be considered as authority contrary to the main contention which we make in the case at bar.

The *latest* case, however, in this Circuit upon the precise point is that of *Spencer vs. Taylor Creek Ditch Co.*, 194 Fed., 635, decided in February, 1912, *after* the decision in the *Doud* case, *Rodger-Ballast* case, the *Gregg* case, and many others, as a result of which the law became definitely settled.

The facts in the *Spencer* case were as follows: A mining company in Alaska gave three mortgages on its property, the second of which covered after-acquired property. Foreclosure was commenced on June 22, 1907, by the first mortgagee against the second and third mortgagees, and the mining company. Thereafter, and in a suit then pending in the same court, wherein Spencer was plaintiff and the mining company was defendant, a receiver was appoint-

ed. The receivership was thereafter extended over the property involved in the foreclosure suit, and permission given to intervene in the creditors' suit in behalf of unsecured claims, as follows:

(1) For labor and supplies for the construction of the Henry Creek Ditch.

(2) For the repair and maintenance of Coffee and Arctic Creek Ditches.

(3) For labor performed in doing assessment work on sundry unnamed, unpatented mining claims.

The Court first considered the question as to whether or not a mining corporation could properly be considered as a public service corporation or a quasi public service corporation. It then held as follows:

“But, *aside from the character of the corporation*, if we turn to the claims themselves in the present case, we find that they do not measure up to the standard required of claims admitted to priority over mortgages in the case of defaulting railroads. *They are not claims for current expenses*; that is to say, for expenses which in the ordinary course of business would have been paid by the corporation out of the current income had not the Court interfered and appointed a receiver of the property. In *High on Receivers* (4th Ed.), Sec. 394-h, the author *states the law* with respect to such claims as follows:

“‘Claims of general creditors of a railway company, which have been incurred prior to the receivership, and which do not fall within the class of current expenses for the ordinary operation and



maintenance of the road, such as necessary labor, supplies, materials or equipment, and which do not, therefore, have any special equities entitling them to payment out of current income, will not be preferred out of the earnings of the receiver, or out of the proceeds of the foreclosure sale. The allowance of claims, which results in the displacement of the priority of mortgage liens, is to be regarded as the exception and not as the rule, and such claims will not be given a preference unless they may fairly and reasonably be regarded *as debts incurred in the ordinary, daily operation and maintenance of the road*. And where the expense is an *extraordinary* one, incurred outside the ordinary course of business of the road, such as for original construction or reconstruction, *or for extraordinary repairs, or for extensions or permanent improvements, the preference will not be granted'*" (id. 641). (Italics ours.)

This Court in the *Spencer* case, therefore, adopted the above quoted rule as expressed in *High on Receivers*, and thus clearly declared it to be the law of this Circuit that expenses for "*original construction, reconstruction or for extraordinary repairs, or for extensions, or permanent improvements,*" will not be granted a preference.

The *Spencer* case has never been criticised or overruled; it stands as the law of this Circuit, and in itself is sufficient to preclude the *Roebling* and the *I. P. Morris* claims (which are clearly for *construction* and cannot accurately even be termed extraordinary repairs) from being accorded any special, equitable preference.

It cannot properly be contended that in deciding the *Spencer* case this Court overlooked the case of *New York G. and I. Co. v. Tacoma R. and M. Co.*, supra, because a reference to the printed papers on appeal in this Court in the *Spencer* case discloses that the *New York Guaranty v. Tacoma R. and M. Co.* case was cited by counsel for Spencer in his brief. For the reasons above stated, we do not consider that the two cases upon this particular point are irreconcilable, but if we are wrong in this, then, surely, the authority of the latter case must be deemed superior.

We might add that counsel for the appellant, in his brief in the *Spencer* case, advanced many of the very same contentions advanced by the appellants in the case at bar.

The appellants rely upon *Railroad Company v. Lamont*, 69 Fed., 23, which was cited in the *Tacoma* case. The intervener's claim in the *Lamont* case was for the expense of maintaining, on certain property which the railroad company had leased to the intervener, certain waiting rooms for passengers and office room for the ticket agent. The claim was clearly an operating expense, since all the intervener did was to maintain, warm and light certain rooms in the hotel building, which the railroad company had leased to him for the benefit of passengers and the ticket agent. Here was a daily and current operating expense. There was no question of construction or improvement or extension, or anything of that nature whatsoever.

Appellants also cite *Virginia Passenger and Power Co. v. Lane Bros. Co.*, 174 Fed., 513, where the claim was for labor and supplies in connection with excavating and removing earth and rock in the widening of a canal. It seems that the power plant had been operated prior to that time by steam and it was desired to operate it by water. The labor was performed within thirty days prior to the appointment of the Receivers. As soon as the latter were appointed, they filed a petition with the Court earnestly recommending that they be allowed to contract with the intervener for the continuance and completion of the work, stating that otherwise the plant might be shut down at any moment

“and that the shutting down or serious disablement of this plant would stop all the cars in Petersburg, throw the town into darkness and prevent the operation of the Richmond and Petersburg Line” (id., p. 514).

It was further the fact that the intervener's contract with the railroad company contained a provision to the effect that payments were to be made monthly in “current funds.” The Court allowed the claim. Apparently, it was influenced by the “going concern” theory, which, as this Court has pointed out in the case of *Moore v. Donahoo*, 217 Fed., 176, at page 181, was repudiated by the Supreme Court of the United States in the *Gregg* case. In fact, the following excerpt from the opinion of the Court in the *Virginia Passenger and Power Co.* case is directly con-

trary to the holding of the majority opinion in the *Gregg* case:

“One of the foundations of the principle is that the public interest requires that a railroad must be kept ‘a going concern.’ It does not depend, therefore, upon the diversion or even upon the existence of income” (*id.*, 516).

The Court, furthermore, was clearly very strongly influenced by the statement of the Receivers and of the General Manager of the Power Company to the effect that if the work in question had not been started and continued the plant would have been liable to have been shut down at any moment, with the result that the city which it served would have been thrown into darkness and all the cars stopped. The decision, therefore, cannot properly be considered an authority in favor of the appellant’s contention.

The same is true with respect to *Central Trust Co. v. Clark*, 81 Fed., 269, decided in the Eighth Circuit in 1897, prior to the decisions of the same Court in the Doud case and the Rodger Ballast case. The Central Trust Company case was also decided upon the “going concern” theory subsequently repudiated by the Supreme Court of the United States in the *Gregg* case, and by later decisions of the Circuit Court of Appeals in the Eighth Circuit handed down subsequent to the *Gregg* case.

The appellants argue that, in determining whether claims of this character are for construction or for maintenance and operation, the amount of the im-



provement must be considered with reference to the value of the system as a whole (Appellant's Brief, p. 69), and they refer with insistence to the fact that the defendant company had a large capital stock and a large bond issue outstanding. In this connection, we repeat what we have already mentioned in our preliminary statement, that the properties of the Railway Company consisted in *two* systems—one, a hydro-electric power system, and the other, an electric railway system. It is true that the Railway Company had issued \$3,625,400 of preferred stock and \$12,566,200 of common stock and that there were several million of bonds outstanding. That the amount of securities outstanding, however, is no indication of the "value of the system" is demonstrated by the fact that the property sold under foreclosure for only enough to pay approximately *fifty-three cents on the dollar to the bondholders*, so that both the preferred and the common stock must be deemed to have been worthless. If any further answer is required to this contention, it is to be found in the opinion of Judge Dietrich in the Court below, where he held with respect to the I. P. Morris claim as follows (Transcript, p. 144) (*italics ours*):

"Furthermore, in considering the character of the work done, and also the sources from which it is reasonable to assume the claimant expected payment to be made, it will not do to compare the cost of the machinery purchased from the claimant with the aggregate value of all the Railway Company's properties. The latter owned not only the

generating plant for which this apparatus was supplied, but also the transmission and distributing systems, and traction properties. *The generating plant alone is here to be considered as the basis of comparison.* What was the relation of the new work to this unit? And if we consider cost and values at all, what is the ratio of not merely the intervener's claim but of the entire cost of new work, including the intervener's claim, to the cost or value of the whole generating plant? As is made plain by the stipulations and the testimony relating to this and other claims, this was not the only expense which the Railway Company was compelled to incur in order to increase its revenue. Some of the additional output, it is true, could be disposed of to new consumers upon existing lines, but not all, for the transmission and distribution of much of the current to be developed by the new installation, new lines into new fields had to be constructed; and, besides, the intervener's claim was but one item in the expense of enlarging the power plant itself."

The important fact to remember is that one of these claimants furnished the machinery, which produces approximately 60 per cent. of the present capacity of the power plant, and the other claimant furnished the copper cable necessary to construct *the new thirty-mile transmission* line which was built to *utilize* the *increased capacity* of the power plant.

We, therefore, respectfully submit that if claims of this character are to be considered "maintenance", "operation", or "ordinary repairs", then there is hard-

ly any conceivable material and supply claimant who may not with equal force properly urge that he is entitled to similar favor, and the "sacredness of contract obligations" and "the vested and contracted priority" of the bondholders (*Kneeland v. American Loan Co.*, 136 U. S., at p. 97) will become a thing of form rather than of substance.

## II.

**The claimants utterly failed to sustain the burden resting upon them to show a diversion of current income earned before the accrual of the debts upon which their claims are based.**

Entirely irrespective of the question as to whether or not the claims before the Court were properly chargeable to capital account or to current expense account, the claimants would, of course, have no standing so far as a preference is concerned, unless they established a so-called "diversion of income". This obviously follows from the decision of the Supreme Court in *Gregg v. Metropolitan Trust Company* (supra). Apparently recognizing that this is true, the attorney for the appellant at page 19 of his brief makes the following statement:

*"The principal assignment of error and the chief reliance for reversal of the decree are based upon the wrongful diversion of the income,"* etc.

Before discussing the facts upon which the appellants attempt to predicate "diversion of income" it is

desirable to review briefly a few of the well-known principles bearing upon this subject.

*a.*

*The burden of proving a diversion of income rests upon the claimant.*

*Central Trust Co. v. East Tennessee, V. and G. R. Co.*, 80 Fed., 624, at p. 626;

*Kansas Loan and Trust Co. v. Electric Railway Light and Power Co.*, 108 Fed., 702;

*Fordyce v. Omaha, Kansas City and E. R. R. Co.*, 145 Fed., 544, at p. 562;

*St. Louis, Alton and Terre Haute Railroad Company v. Cleveland, Columbus, Cincinnati and Indianapolis Railway Co.*, 125 U. S., 658, p. 674;

*Lincoln Trust Co. v. Missouri Water, Light and Traction Co.*, 131 S. W., 889, at p. 891.

In the case of *Central Trust Co. v. East Tennessee, V. and G. R. Co.*, 80 Fed., 624, Judge Lurton (Taft and Severens, JJ., concurring) used the following language at page 626:

"The burden is upon complainants to show that there has been a misappropriation of earnings to the improvement of the mortgaged property or to the payment of interest, before the mortgagees can be justly called upon to reimburse the fund applicable to debts of the income in consequence of such diversion. If interest was paid or improvements made out of borrowed money, then



there was no diversion; or if made out of gross earnings, and the latter was reimbursed by borrowed money, the diversion was made good."

In the case of *Kansas Loan and Trust Co. v. Electric Railway Light and Power Co.*, 108 Fed., 702, the Court held as follows:

"As the intervener's right to a preferential claim is dependent upon the fact that there has been a diversion of the net earnings of the mortgaged property over and above the necessary expenditures for operation, and that such diversion has inured to the benefit of the mortgagees (*Bank v. Doud*, 105 Fed., 123), *the burden of proof rests upon the intervener to establish this fact.*" (Italics ours.)

In *Fordyce v. Omaha, Kansas City and E. R. R.*, 145 Fed., 544, at p. 562 the Court held as follows:

"Before the intervener can charge the corpus of the property in the hands of the purchaser with the payment of its claim, the burden is upon it to show that but for such diversion there would have been a net surplus of earnings subject to the equitable lien".

In *Lincoln Trust Co. v. Missouri Water, Light and Traction Co.*, 131 S. W., 889, at p. 891 the Court held:

"Whatever may be the tendency of modern jurisprudence to favor the payment of 'last illness' expenses of defunct corporations over mortgage debts, the burden is on the claimant to show that

his demand was for sustenance that prolonged the life of the expiring corporation, and that funds which should have been used to discharge a debt so sacred were diverted to the payment of mortgage debts or other less sacred obligations."

*b.*

*A mortgagor railroad company is not bound to accumulate a surplus to meet possible deficiencies in the income to pay future income debts.*

In *Central Trust Co. of New York v. East Tennessee, V. and G. R. Co.*, 80 Fed., 624, at p. 626 the Court held as follows:

"Prior to the period covered by the maturity of appellants' claims, there was a surplus of gross earnings over all operating expenses; but it cannot be contended that the company was under any obligation to future creditors to accumulate a surplus to meet possible deficiencies in the income to meet future income debts, or that it was improper to apply such surplus in payment of interest. *St. Louis, A. and T. H. R. Co. v. Cleveland, C. C. and I. Ry. Co.*, 125 U. S., 658-675, 8 Sup. Ct., 1011."<sup>2</sup>

*c.*

*So-called diversions prior to the creation of the debts sought to be enforced as an equitable lien cannot be availed of by claimants seeking a preference.*

In *Kansas L. and T. Co. v. Electric Railway L. and P. Co.*, 108 Fed., 702, at p. 703 the Court held as follows:

“This intervener has nothing to do with the earnings of the road, or their diversion by the road, *prior* to the creation of its debt. The creditor can only concern himself about diversions of the current earnings *after* the creation of his debt.” (Italics ours.)

In the case cited the Court referred the matter back to the Master, among other things “to make an amended report therein, setting out the substance of the testimony in the case before him respecting this claim, with an ascertainment, if found in the evidence, *of what were the current gross earnings from the operation of the property on which the lien is sought to be enforced AFTER the creation of the interveners’ claim* up to the time of the appointment of the Receivers, and what were the net earnings, if any, *during that period* after deducting the ordinary expenses of operating the property” (id., p. 704). (Italics ours.)

See also *Fordyce v. Omaha, Kansas City and E. R. R. Co.*, 145 Fed., 544, at p. 555.

It is apparent from the foregoing that in determining the question as to whether or not there has been a diversion of *current* income the Court can only consider income earned *after* the creation of the debts. This of course is entirely consonant with the logic of the whole doctrine under discussion and with common sense. A railroad company which is enjoying a net income may properly assume that *subsequently* earned income will be sufficient to take care of *subsequently*

maturing income *debts*, and may, therefore with absolute propriety, pay out any *present* surplus of net income in payment of bond interest or for construction work. If the rule were otherwise, it might be impossible for railroads under certain circumstances to finance themselves. Even in *Fosdick v. Schall*, the Court stated that the implied agreement of the railroad mortgagee was merely that the *current* debts made in the ordinary course of business should be paid "from the *current* receipts".

Bearing in mind, therefore, that the burden of proving a "diversion of income" is upon the claimants; that a mortgagor railroad is not bound to accumulate a surplus of net earnings to take care of *future* operating debts, and finally that in order to create a so-called "diversion" the gross earnings applied in payment of bond interest must have been earned *after* the accrual of the debts for which preference is claimed, let us now examine such facts bearing upon this subject as the record before this Court contains.

FIRST: As to the Roebling claim. The so-called diversion upon which counsel for the appellants relies is the payment on June 1st, 1913, of interest on the bonds of the defendant company held by the Guaranty Trust Company amounting to \$165,750.00, interest on the bonds of the Boise and Interurban Railroad Company amounting to \$26,825.00, and interest on the bonds of the Boise Railroad amounting to \$9,725.00, making a total of interest paid of \$202,300.00 (see Appellants' opening brief, p. 11).



Of this amount, however, \$56,750.00 was derived from the proceeds of sale of the Company's bonds, and \$30,000.00 was borrowed on the Company's note from Kissell, Kinnicut and Company, making a total of \$86,750.00 derived from sources other than earnings. Deducting this last amount from the \$202,300.00, which was paid out, leaves a balance of \$115,750.00, which claimants contend was the sum diverted from earnings. Before discussing the question as to when this sum was earned, we call the Court's attention to the fact that it includes \$9,725.00, representing interest on bonds of the Boise Railroad Company. This last payment, however, did not inure to the benefit of the bondholders of the defendant company. As to this the following appears in the decree of the Court below (Tr., p. 160): "Nothing herein contained shall be construed to charge the said Guaranty Trust Company or bondholders represented by it with interest or construction payments made on account of said Boise R. R. Co., *the properties of which have been decreed not subject to the mortgage of the said Guaranty Trust Company and have been segregated from the Receivership estate.*" So that at the outside the most that can possibly be claimed by the appellants is that \$105,825. was diverted.

It is of the utmost importance, however, to note that the earnings from which this payment was made were all earned *prior* to June 1st, 1913, and in fact all but a little over \$1,000. of such earnings was earned before *May 1st*, 1913. The stipulation of facts (Tr.,

p. 43) shows that deposit reserves were made by the Railroad Company from its earnings and from the proceeds of sale of its bonds to pay bond interest as follows:

December, 1912—Deposit reserve . . . .	\$ 24,345.83
January, 1913—Deposit reserve . . . .	26,746.
February, 1913—Deposit reserve . . . .	25,545.65
March, 1913—Deposit reserve . . . .	31,029.16
April, 1913—Deposit reserve . . . .	26,916.66
May, 1913—Deposit reserve . . . .	1,166.70

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Total . . . . . \$135,750.

In other words, during the six months prior to the date of the alleged diversion more than \$20,000. in excess of the largest amount which the claimants can properly contend was diverted had been derived by the company from its earnings during the said six months' period and from the sale of bonds.

The record does not show when the different items of which the Roebling claim consists were delivered, except that it states that the supplies and material in question were sold and delivered between the 18th of March, 1913, and the 30th day of May, 1913 (Tr., p. 42). The payment for this copper cable was not due, however, until thirty days from the delivery of the various items (Tr., p. 42). The earliest date therefore when there can properly be said to have been any debt due from the defendant company to the Roebling Company was on the 18th day of April, 1913, viz.: 30 days after the first date when anything was delivered. A reference to the tabulation of de-

posit reserves, however, discloses the fact that at that time there had *already* been earned and set up by the defendant company as a deposit reserve to pay bond interest the sum of \$134,583.30, namely, the entire total of deposit reserves above set forth, except the deposit reserve for May, which only amounted to \$1,166.70.

Furthermore, it is to be noted that included in the amount which the claimants contend was diverted was the interest on the bonds of the Boise and Interurban R. R. Co. amounting to \$26,825. *This payment, however, was made on April 1st, 1913, only thirteen days after the account of the claimant was opened and seventeen (17) days before anything was due thereon.* From any point of view, therefore, it is impossible to treat the payment of interest on the bonds of the Boise & Interurban R. R. Co. as a diversion.

But the appellant Roebing will contend that even though the income was earned *prior* to the accrual of its claim that nevertheless the *payment* thereof was not made until June 1st thereafter. The date of the *payment* of the interest, however, was a mere accident. It might have fallen on the 1st of May or the 1st of April. It merely *happened* to fall on the 1st of June. The important fact is that the *earnings* from which payment was made had practically all accrued by April, *prior* to the accrual of the Roebing debt, and had prior to such accrual actually been *appropriated and set aside* by the Railroad Company to meet the bond interest.

We therefore submit that there is not the slightest justification for claiming a diversion of income as to the Roebbling claim.

This claimant has heretofore contended that it sold the goods in the belief and in the intention "that the same should be paid out of *current* operating income."

Does it *now* claim that it sold goods in the intention and belief that they should be paid for out of *past* operating income? If so, how does it reconcile this claim with the allegations in its bill, paragraph IX, as follows:

"Your intervenor further shows and represents to your Honors that large sums of money received by said Idaho Railway Light & Power Company as income from the operation of the properties of said corporation *subsequent to the sale and delivery thereto* by said intervenor of material and supplies herein described, have been diverted from the funds of said corporation available for the payment of said accounts of this intervenor as follows \* \* \* notwithstanding the fact, that the material and supplies so sold and delivered by intervenor, as herein alleged, to the said Idaho Railway Light & Power Company has been added to the property of said corporation and has increased the value thereof and the security of the holders of said mortgage bonds to the extent of the value of said material and supplies so sold and delivered, the income and revenue derived from the operation of said properties, *and due in part to the use of the said material and supplies*, has been by said corporation paid to the said Guaranty Trust Company



of New York as 'Trustee on account of interest upon said bonded indebtedness' (Tr., pp. 36 to 38).

In other words, in its bill of intervention this claimant charged that the income which was "diverted" had been received by the defendant company *subsequent* to the sale and delivery of the merchandise on which it bases its claim, and it seeks to emphasize the injustice of such conduct by also alleging that the income and revenue so diverted was due in part to the use of the very material and supplies which it furnished.

Thus this claimant has *alleged* that the income which was diverted had been earned *after* its claims had accrued. The *record* shows, however, that the moneys paid out in payment of bond interest were derived from earnings made *prior* to the accrual of claimants' debt.

SECOND: As to the I. P. Morris claim. The alleged diversion is claimed to have taken place on June 1st, 1913. The receiver was not appointed until December 23rd, 1914, nearly seven months thereafter. The I. P. Morris Company in its bill of intervention alleged with respect to the machinery and labor which it respectively furnished and performed:

"That such machinery was all furnished and such labor performed at the special instance and request of the said Railroad Company during the year 1913, and *within six months prior to the appointment of the said O. G. F. Markus as receiver of the said Railway Company*" (Tr., p. 53).

At page 35 of his opening brief counsel for the appellants makes the following statement in connection with his discussion of the "six months rule":

"The material and labor upon which the I. P. Morris Company claim is based was furnished and supplied *within six months before the appointment of receiver*, and the question does not arise in respect to that Company's claim."

In his anxiety to escape from the effect of the six months' rule, counsel for the I. P. Morris Company has impaled himself upon the other horn of the dilemma. If, as his client has alleged in its bill, and as he claims in his brief, the Morris claim did not accrue until within six months prior to the appointment of the Receiver, then he is out of court on the question of diversion of income. This is true, quite irrespective of whether the the payment of June 1st (insofar as it constituted a payment out of earnings at all) represented earnings practically altogether made by the Railroad Company prior to May 1st, 1913, because obviously if the Morris claim did not accrue until within six months of the appointment of the Receiver on December 23rd, 1913, it could only have accrued *after* the payment of interest on June 1st, 1913.

"Payments of interest are not a diversion of earnings as regards a creditor to whom there is nothing due at the time those payments are made."

*Short on Law of Railway Bonds and Mortgages*, p. 606, Section 614; *Foster Federal Practice*, 5th Edition, Vol. 1, Section 305, Section 962, Note 23.

Before we leave this subject, we wish to call to the attention of the Court that the date of the alleged diversion, namely, June 1st, 1913, was nearly seven months prior to the date of the appointment of the Receiver, and therefore outside of the six months' preferential period. Furthermore, there were but a few isolated diversions in this case, only two of which are before this Court. Under these circumstances, there is no question of marshaling numerous claims with reference to diversion, and calculating the distributive share to which each is entitled which this Court in the *Donahoo* case, pointed out might be difficult.

On the contrary, the situation with regard to the claims at bar is that we have two isolated claims and one isolated alleged diversion, and no *proof* that the payment of June 1st represented earnings earned and received by the defendant company *subsequent* either to the accrual or maturity of the appellants' claims.

### III.

**Concededly the Roebling claim accrued more than six months prior to the appointment of the Receiver. Either the same is true with respect to the I. P. Morris claim, or there was no diversion of income after the accrual of that claim. In neither case is there any special equity requiring the Court to disregard the six months' rule.**

The appellants in their opening brief, at page 35, state that the claim of the Roebling's Sons Company "was incurred about seven months before the appointment of the Receiver". The material was sold and delivered between March 18 and the 30th of May, 1913, but the record, as we have heretofore pointed out, does not show how much was delivered on any particular day or days during that period. It would be more accurate, therefore, to say that the merchandise upon which this claim is based was sold and delivered to the defendant company during the period from over nine months to approximately seven months prior to the appointment of the Receiver in the creditors' suit, and from ten to eight months before the institution of the foreclosure proceeding and the extension of the receivership to such proceeding.

In the case of the I. P. Morris Company claim, however, counsel for the appellants states that the material and labor upon which the same is based was "furnished and supplied within six months before the appointment of the Receiver, and the question does not arise in respect to that Company's claim" (p. 35). As we have pointed out under Point II, however, if



the I. P. Morris claim did not mature until within six months of the appointment of the Receiver, then it necessarily matured *after* the only payment which it is contended constituted a diversion of income, namely, the payment of the bond interest on June 1, 1913. In order, therefore, to establish a *subsequent* diversion, it is necessary for this claimant to make its claim date as of the date of the contract itself, namely, October, 1912. By so doing, however, the claim becomes stale under the six months' rule.

But the appellants' counsel takes the position in his brief that there *is* no such thing as a "six months' rule". We do not contend that there have not been sporadic instances where courts of equity have allowed as preferential, claims which matured more than six months before the appointment of the Receiver in the foreclosure proceedings. We *do* maintain, however, that the *general* rule is the other way, and that it is only in *special* and *extraordinary cases*, where the circumstances are so unusual as to create an equity in the claimant entirely beyond the common, that there has been any variation from the general rule.

In one of the earlier cases on the subject, Mr. Justice Harlan of the Supreme Court of the United States, then sitting as Circuit Justice in the case of *Thomas v. Peoria and R. I. R. R. Co.*, 36 Fed., 898, discussed the six months' rule with much clearness and authority, as follows:

"Upon these grounds, substantially, rests the rule that recognizes the right of the Court to charge the income earned during the receivership

with obligations for labor, supplies and equipment, contracted by the railroad company *during the six months immediately preceding the receivership*. Such debts constitute operating expenses incurred to the end that mortgage bondholders might be protected, and that the company might be kept upon its feet, and subserve the public purpose for which it was established, namely, the maintenance of a highway for the convenience of the people. \* \* \* It may be added that the grounds upon which the Court may charge the income of mortgaged railroad property, earned during the receivership, with debts for labor, supplies and equipment received prior to the appointment of the Receiver, are so fully stated in some of the cases cited—particularly in *Fosdick v. Schall*—that further discussion of them is unnecessary. *But I will say that the six months' rule was observed by me at the circuit when disposing of the case of Trust Co. v. Railway Co., and the final decree, so far as it rested upon that rule, was not disturbed by the Supreme Court.*" (Italics ours.)

Id., pp. 819, 820.

Lurton, C. J. (afterwards Justice), in his opinion in the case of *Central Trust Co. of New York v. East Tennessee, V. and G. R. Co., et al.*, 80 Fed., 624, held as follows with respect to the decision of Mr. Justice Harlan just quoted from:

"In the Seventh Circuit, we have the authority of Mr. Justice Harlan for saying that a limitation of six months has been regarded as a proper limitation upon such claims. *The precise grounds upon which such a rule rests are so well stated by the*

*learned Justice that we quote and adopt his reasoning, as reported in Thomas v. Railroad Co., 36 Fed., 808.” (Italics ours.)*

Id., 629.

And again in the same opinion speaking of the rule of the Sixth Circuit, the Court held as follows:

“In this circuit a six-months rule has been almost universally imposed” (630).

It appeared in that case that the Circuit Court had passed an order providing for the payment of certain operating, supply and repair claims accruing within six months before the appointment of the Receiver. Mr. Justice Lurton there held, with respect to this order, as follows:

“The appellants present no *special circumstances* which will justify a departure from this general order, under which all such claims have been settled, and we feel altogether indisposed to *arbitrarily extend a limit imposed in the sound discretion of the Circuit Court.*” (Italics ours.)

Id., 630.

To the same effect see the opinion of Judge Blodgett, in *Reyburn v. Consumers Gas, Fuel and Light Co.*, 29 Fed., 561, at 563, where he used the following language:

“The doctrine of *Fosdick v. Schall* and the subsequent cases on the same question, is that, for the purpose of keeping works of a public character, within which the works of this company may be properly included in operation, those who have given the company credit for the supplies neces-

sary to keep the works in operation—current operating supplies—are to have a lien extending back not to exceed six months, except under extraordinary circumstances.” (Italics ours.)

Id., 563, 564.

See also the opinion of Sanborn, C. J., in *Rodger Ballast Car Co. v. Omaha, K. C. and E. R. Co.*, 154 Fed., 629, at p. 632.

“There is another indispensable attribute of a preferential claim. It is that its consideration was a current expense of the operation of the mortgagor incurred in the ordinary course of its business *within a limited time, usually six months, anterior to the appointment of the Receiver.*” (Italics ours.)

Id., 632.

It is true that in the case of the *N. Y. Guaranty and Indemnity Co. v. Tacoma Railway, etc.*, the Circuit Court of Appeals in this Circuit, said in its opinion (p. 370) that there is no fixed arbitrary rule, barring preferential claims that have been contracted more than six months before the appointment of a Receiver. The appellants' counsel makes much of this case, stating that a preference was allowed upon a claim therein for material purchased more than two years before the appointment of the Receiver. The Court, however, pointed out that the intervener had begun suit in the Washington state court before the Receiver was appointed, and only about twelve months after the delivery of the cable, and thereafter recovered a judgment, and then held that:



“The period of time that transpired between the time that the intervener instituted its action and the appointment of the Receiver cannot properly be included in this computation of time.”

It must also be observed that doubt has since been cast upon the authority of the *N. Y. Guaranty and Indemnity Company* case because it was decided upon the “going concern” principle, later repudiated by the Supreme Court of the United States in the Gregg case, as this Court itself has pointed out. (See *Moore v. Donahoo*, 217 Fed., 177.)

Irrespective of the foregoing, however, the decision of this Court in the case of *Spencer v. Taylor Creek Ditch Co.*, 194 Fed., 635, is decisive on this point. In the Spencer case two of the same judges were sitting who sat in the *N. Y. Guaranty & Indemnity Co.* case. In the interval between the two cases the *Doud* case, the *Rodger-Ballast* case, the *Gregg* case, and several other important Supreme Court cases, had been decided, all showing a decided tendency to restrict the doctrine of preferential claims of this character.

We have already reviewed the facts of the Spencer case under Point II of this brief. The appellants' counsel in his brief at page 35, in the case at bar, states that the claim in that case was contracted about a *year* prior to the appointment of the Receiver, but it appears from the opinion of the Court that there were several claims and that the period of default as to some of them might not have been more than nine months (*id.*, 642). The Court held on this point as follows:

“Furthermore, stale claims are not allowed for expenses incurred prior to the appointment of a Receiver. Such claims to be admitted to priority must have been incurred within a reasonable time before the receivership to be admitted as ‘current expenses’. In *Thomas v. Railway Co.* (C. C.), 36 Fed., 818, 819, Mr. Justice Harlan, sitting in circuit, in 1888 *stated a rule of limitation which has been observed by the courts ever since.* He said:

“ ‘The general rule that has obtained in this circuit for many years, though not fully or expressly formulated in any published decision, has been not to charge the income of mortgaged property accruing during a receivership, or the proceeds of the sale of such property with general debts for labor, supplies and equipment, *back of the six months immediately preceding the appointment of a Receiver.* While the Court has not, perhaps, committed itself against applying a different and more liberal rule, *when the special circumstances or equities of the case demand such a course, the general rule is as just stated; and I am unwilling in this case, and at this late day, to depart from it.* Besides, I am of the opinion that, under the circumstances that usually attend the administration of railroad property by the courts, through receivers, *the rule stated is a wise and salutary one.* It would not do to charge the income of mortgaged railroad property, managed by a Receiver, or the property itself, with every debt incurred in all its previous history for labor, supplies or equipment. As was said in *Fosdick v. Schall*, the business of all railroad companies is, to a greater or less extent, done on credit. Those who per-

form labor, or furnish supplies and equipment, usually expect and contract to be paid within a reasonable time; and they do not ordinarily perform labor, or furnish supplies or equipment after the railroad company has failed to pay within such time for what has been previously done or furnished. Expenses incurred within such reasonable time constitute what are called 'current expenses', which ought, if possible, to be paid out of the receipts during the same period. When, therefore, debts of that character remain unsettled, or are not put in suit, for such a time as would be deemed unreasonable, it may be fairly presumed that the creditors have ceased to look to current receipts for payment, and have accepted the position of general creditors who, as such would have no claim for indemnity upon any special part of the income.'

"In the present case the Receiver was appointed by the Court in the original action about July 1, 1907. The amended complaint in intervention in this case was filed October 31, 1908. The claims are for expenses incurred by the corporation in the mining season of 1906. The corporation must have been in default for more than a year with respect to many of these claims when the original action was commenced, and not less than nine months with respect to any of them. *We are not aware of any case that would admit to priority claims of this character.*" (Italics ours.)

The extent to which the "six months' rule" is now generally regarded as prevailing is demonstrated in the discussion of the general doctrine of equitable preferences to be found in Cook on Corporations, 7th Edi-

tion, Vol. 4, Section 861. We quote therefrom as follows:

“Section 861. *The ‘six months’ rule,’ to the effect that labor and supply claims arising within six months prior to a Receiver being appointed will be paid out of the income received by the Receiver.*—When a Receiver of a railroad is appointed he commences at once to take the income from the operation of the road. This income at first is due largely to supplies furnished and labor done prior to the receivership. Accordingly it is but just that such claims, for a reasonable length of time prior to the receivership, should be paid out of the income received by him, especially as that income would have been used by the company for that purpose if the Court had refused to appoint a Receiver. *Six months have been fixed upon by the courts as the proper limit of past time during which labor and supply claims enter into the income received by the Receiver.*” (Italics ours.)

The author then proceeds to discuss the different phases of the general doctrine, but it is interesting to note that, throughout, he uses the phrase “six months’ rule” to characterize the entire principle of equitable preferences which found its genesis in *Fosdick v. Schall*; in other words, in the opinion of this careful and authoritative text book writer, the limitation of six months has become so firmly imbedded in the general principle that the latter takes its name from the rule of limitation.

A further reason why six months has been chosen by the courts as the proper limit is to be found in the



language of the Circuit Court of Appeals for the Eighth Circuit, in *Westinghouse Air Brake Co. v. Kansas City So. Ry. Co.*, 137 Fed., at page 26, where (at page 40) the Court held as follows:

“Mortgage bondholders have the right to the payment by the mortgagor of the current expenses of the operation of the railroad by their debtor with reasonable promptness. *The reason that six months is approximately the limited time within which preferential claims must accrue is that there is usually an interval of six months between the dates when installments of interest upon the bonds fall due \* \* \*.*” (Italics ours.)

Such is the fact with respect to the mortgage of the Guaranty Trust Company in the case at bar, interest being due semi-annually on June 1st and December 1st.

The same Court further held as follows (137 Fed., 41):

“The cases in which special circumstances have induced courts to prefer claims which accrued more than six months before the appointment of receivers, and in which extensions of times of payment have not proved fatal, are not out of mind. *But those decisions were induced by the peculiar equities of the respective cases, and the fact remains that the general rule is that the time within which claims which are entitled to payment out of the income or proceeds of the mortgaged property in preference to the mortgage debt must accrue is six months preceding the impounding of the income and the seizure of the property by the mortgagees.* 23 Am. & Eng. Enc. of Law, 816.” (Italics ours.)

The appellants, however, cite a number of cases, at page 34 of their brief, to sustain their contention that courts of equity have not necessarily adhered to the six months' limitation. In *Skiddy v. Atlantic R. R. Co.*, 3 Hughes, 320, it seems that upon the appointment of the receiver it was discovered that there were wages in arrears for eight months back due to the then *present* employees of the road who had been continued by the receiver in his employ. The receiver represented to the court (*id.*, 337) that unless all back wages due to employees "then actually in the employ of the company should be paid", he "would not be responsible for the consequences of a refusal of it by the court to the property of the company or the safety of passengers". In other words, the only alternative to payment was violence, destruction of life and property. Under these circumstances, the court naturally passed the decree authorizing the receiver in his discretion to pay the arrearage of wages, and for aught that appears, there was no opposition to this wise and practical disposition of the matter. There was no question of legal or equitable right, but merely one of expediency. It is further to be noted that with respect to claims for material and supplies furnished during the period of one year or more before the appointment of the receivers, and with respect to claims of *former* employees of the road, the court held that they were *not* entitled to any preference (*id.*, 389).

The case of *Burnham v. Bowen*, 111 U. S., 776, is also cited as an authority for the proposition that the court preferred a claim arising eleven months prior

to the appointment of the receivers. In that case it appears that the latter took office on January 2, 1875. The claim was for coal furnished to the company "during the year 1874, but the precise time in the year is not given" (bottom page 777, top page 778). There is nothing in the statement of facts or the opinion of the court to show that the coal was delivered more than six months before the appointment of the receiver, and not a word in the opinion of the court concerning the six months' rule. The case, therefore, is nugatory, so far as this question is concerned.

The same may be said with respect to *Central Trust Co. v. Wabash R. R. Co.*, 30 Fed., 332. Although particular reference is made by the appellants to page 334 of this report, there is not a word on that page concerning the six months' rule, nor, in fact, is there any discussion of that rule in the entire opinion of the court. In fact it is not stated therein when the preferential claims there under discussion accrued. The whole question before the court was as to the fairness of the apportionment of earnings among different divisions of a large railroad system. The case does not even bear a resemblance to the point under discussion.

*Farmers Loan and Trust Co. v. Kansas City Co.*, 53 Fed., 182, is also strongly relied upon by the appellants to sustain their contention that there is no six months' rule. That was a decision by Circuit Judge Caldwell of Kansas in 1892. There the court made a general order requiring as a condition of the appointment of the receiver that the plaintiff should consent,

upon the record, that *all* debts for repair and materials, contracted since the date of making the mortgage, be paid out of the proceeds of the foreclosure sale, if not sooner paid out of the earnings of the road. After being particularly advised of the terms of this order, the plaintiff Trust Company instructed its counsel to assent to the condition and the receiver was thereupon appointed expressly *upon* such condition. Thereafter certain bondholders on their own application, petitioned to become parties defendant and moved to strike from the decree that part of the order awarding priority to the claims in question. The court held that the appointment of the receiver was not a matter of right, but rested in the sound discretion of the court, that the latter in appointing such receiver might impose such conditions as appeared to be just and equitable, and that the parties asking for and accepting the appointment of the receiver upon such conditions will be bound thereby; and further that since a trustee in a railroad mortgage foreclosure represents the bondholders, whenever such trustee in good faith assents to terms imposed by the court as a condition for appointing the receiver, the bondholders are bound by such assent as fully and absolutely as if it had been given by them in person (*id.*, 185).

Inasmuch as the objecting bondholders did not allege any fraud or bad faith on the part of the trustee (*id.*, 186), Judge Caldwell could, and we respectfully submit should, have stopped at this point in his decision. Nevertheless, he proceeded to expound, at considerable length, his general ideas on the subject of



preferential debts of railroads, and although this part of his opinion is interesting, it is nothing more than pure dictum. Among other things he holds that a diversion of income is not essential to give these debts priority (*id.*, 189). In this respect he must be deemed to have been overruled by the Supreme Court of the United States in the Gregg case. Judge McKenna in his dissenting opinion mentions the Farmers Loan & Trust case as being contra to the majority opinion of the Supreme Court in the Gregg case on the point of there being no necessity of diversion of income. Furthermore, even Judge McKenna in his dissenting opinion, in the Gregg case, holds, with respect to the rule of preference, as follows:

“It cannot be confined to debts contracted during the receivership. It may extend to debts contracted before the appointment of the receiver. But recognizing that there must be some limitation of time, *the courts have fixed six months as the period within which preferential claims may accrue.*” (*Italics ours.*)

197 U. S., 196.

Again the Farmers Loan and Trust Company case was decided in the Eighth Circuit, and appellants, counsel himself admits in his brief, at page 33, that the courts in that circuit are bound by the six months' limitation.

*Hale v. Frost*, 99 U. S., 389, is also cited by the appellants as an authority upon this point. That case was decided immediately after the case of *Fosdick v. Schall*, in 1878, which was practically the year of the

birth of the preferential claim doctrine, and before the Supreme Court or the various Circuits Courts had had an opportunity to develop its limitations. There is no discussion in the *Hale* case of the question of time.

Appellants also cite *Southern Railway Company v. Carnegie Steel Company*, 176 U. S., 257, as an authority upon this proposition, but there the court held with respect to the six months' rule, at page 292, that:

"Such a rule will do full justice in most cases to creditors who are entitled to look to current receipts for the payment of current debts."

The court then proceeded to cite with approval the language of Mr. Justice Brewer in *Blair v. St. Louis R. R. Co.*, 22 Fed., 471, at p. 474, touching this question of time and the principles upon which the equitable rights of creditors in such cases rests, as follows:

"The idea which underlies them I take to be this: That the management of a large business, like that of a railroad company, cannot be conducted on a cash basis. Temporary credit, in the nature of things, is indispensable. Its employes cannot be paid every month. It cannot settle with other roads, its traffic balances at the close of every day. Time to adjust and settle these various matters is indispensable. Because, in the nature of things, this is so, such temporary credits must be taken as assented to by the mortgagees. \* \* \* In this view, such temporary credits accruing prior to the appointment of the receiver must be recognized by the mortgagees and such claims preferred. Now, for what time prior to the appointment of a receiver may these credits be sustained? There is

no arbitrary time prescribed, and it should be only such reasonable time as, in the nature of things and in the ordinary course of business, would be sufficient to have such claims settled and paid. *Six months is the longest time I have noticed as yet given. Ordinarily, I think that is ample.* Perhaps, in some large concerns, with extensive lines of road and a complicated business, a longer time might be necessary" (pp. 292, 293). (Italics ours.)

In *Southern Railway Co. vs. Carnegie Steel Company* case the mileage was enormous, since the Danville Company possessed and controlled, in addition to its own line, more than twenty other railways, and its business was, necessarily, tremendously complicated.

We are confident that after an examination of all the cases cited on this point, not only by us, but also by the appellants, this Court will find the true rule to be as stated by Judge Dietrich in his opinion in the Court below, where he holds as follows (Transcript 136):

"Generally, too, the application of the principle is limited to labor and supplies furnished within the period of six months immediately prior to the institution of the receivership. In a sense doubtless the limitation is arbitrary, but nevertheless it has come to prevail as a general rule. *Spencer vs. Taylor Creek Ditch Company*, 194 Fed., 635.  
\* \* \* True, the time limit is not always observed, and instances may be cited where claims of much longer standing have been recognized, but if a rule at all, it must control in all cases which are not substantially exceptional. The discretion to

relax it is a judicial discretion, resting upon something more substantial than mere whim or caprice" (Transcript 137).

What special circumstances or facts do the appellants urge in order to induce this Court to relax the general rule and to "extend a limit imposed in the sound discretion of the Circuit Court" (*Central Trust Co. v. E. Tenn. V. and G. R. Co.*, 80 Fed., 624, at 630)?

So far as we can judge from the appellants opening brief (pp. 30 and 31), they base their claim to special equities upon the following alleged facts:

"Stated more clearly, the manager of the bondholding syndicate who was also the Vice-President and Managing Director of the Railway Company, himself was responsible for the purchase of the material, which was to be paid for out of the earnings, and almost immediately thereafter diverted the earnings to the payment of the interest on his own bonds; and a few weeks over six months thereafter, joined in the petition for the appointment of the receiver. Among all the cases upon this subject we think none will be found in which the creditor has been denied payment, and the bondholder permitted to retain the benefit, where all of the elements of preferential claims above outlined have been present."

Now let us examine the record for the purpose of testing whether or not the above is a fair statement of the facts as proved in this case.

It is, of course, true that Mr. Fuller was Vice-President of the Railway Company. It is only *par-*



tially correct to say that he was "managing director of the railway company." The testimony on that point was as follows:

"Samuel L. Fuller is the Vice-President of the Railway Company, and with respect to finances, he was in fact its managing director, *but not in respect to the technical or the detailed management of its affairs; I had charge of that*" (Tr. 118).

It is to be noted that the witness was Mr. Markhus, who prior to his appointment as receiver, was himself *general* manager of the company.

The next statement is that Mr. Fuller "*himself* was responsible for the purchase of the material, which was to be paid for out of the earnings." There is no proof of that fact in the record. The only testimony on this point—which, by the way, relates solely to the Roebbling claim—is the following by Mr. Markhus:

"The order was placed *here*. *I don't recall who* instructed me to give the order, but we got instructions from New York. *Someone* advised us of the necessity of building that line in order to fill those power requirements of the Gem District" (Tr. 118).

Far from stating that *Mr. Fuller* "was responsible for the purchase of the material" the witness testified that the order was placed by the *local* management and that he did not recall *who* instructed him to give the order. The further statement "but we got instructions from New York" is of absolutely no probative value on this point, since he did not state *what*

were his instructions or *who* gave them.

So far as the I. P. Morris claim is concerned, there is not even a *pretence* of any proof that Mr. Fuller was responsible for the purchase of the material.

With regard to the further statement that the material "was to be paid for out of the earnings" we have already pointed out that there is no proof in the stipulation of facts or elsewhere in the record that it was the intention of the *Railway Company* that these materials should be paid for out of earnings, and so far as the I. P. Morris claim is concerned, the stipulation of the facts with respect to the belief and intention of that company was merely that the materials would be paid for out of current income, "unless *otherwise* provided for by the *Railway Company*" (Tr. 73).

But even assuming that Mr. Fuller *was* responsible for the purchase of the material, not only from the Roebling Company but also from the I. P. Morris Company, in what respect does that add to the claimants' equity? Of what importance is the fact that Mr. Fuller was also the manager of a syndicate composed of fifty or one hundred different bondholders, scattered all the way from Montana to New England (Tr. 128)? The appellants in their brief (p. 70) expressly concede that Mr. Fuller's connection with the company and the syndicate constitutes no estoppel, "nor is it intended *as a charge of bad faith or fraud.*" Therefore, assuming merely for the purposes of argument, that Mr. Fuller *was* responsible for the purchase of the material, acting without fraud, and in

all good faith, as this Court is bound to presume in view of the record and of the appellants' concession—how does this fact serve to invest the appellants' claims with any peculiar or extraordinary equity?

There is no proof that Mr. Fuller or any other member of the syndicate directed the railroad company to *withhold* payment of these claims so that the bond interest, due on June 1, might be paid.

There is not the slightest suggestion in the record that at the time, June 1, 1913, when this interest payment was made, Mr. Fuller or anyone else anticipated the appointment of a receiver.

*On the contrary, the record shows that as late as May, 1913, Kissel, Kinnicutt and Company, Mr. Fuller's own firm, was willing to, and did loan the company \$30,000 merely on its note (Tr. 43).*

If Mr. Fuller was, at the time, cunningly contriving to divert the current income of the company to the payment of bond interest at the expense of the claimants and with a view to the possible insolvency of the company, it seems most extraordinary that he should have been so foolish, at the very same time, as to sink \$30,000 of his own money or that of his firm, into this very same enterprise whose imminent failure the appellants intimate, but do not openly charge, he then had in mind.

The entire basis upon which the claimants seek to predicate an extraordinary or special equity is so flimsy as to hardly justify further argument. We can do no better than to quote from the language of Judge Dietrich on this point:

“What reason can be assigned for treating the instant claim as an exception? It is a just debt and should be paid. But that is an appeal which any creditor of any insolvent debtor can make. The claimant expected to be promptly paid in the ordinary course of business, but such is the usual expectation. *There were no misrepresentations, no deceitful promises, by which it was induced to remain inactive. Upon the whole, the case is one of ordinary commercial credit, typical, rather than exceptional*” (Transcript 137).

And again at page 139:

“Effort was made to show that the relation of the bondholders to the Railway Company was such as to estop the trustee from denying the intervenor’s equity, but the evidence will not support a finding of that character. Essential elements of estoppel are wanting” (Transcript 139, 140).

It is the practice of those who desire to be considered preferential claimants to dilate upon the unfortunate situation of the material and supply creditor and upon that basis to appeal to the sympathy of the Court. But what about the situation of the bondholders? If this Court should reverse the decision of the court below and grant to these claimants a preference over the mortgage bondholders, it will, we respectfully submit, extend the doctrine of equitable preferences to new fields, and its decision will become a new landmark in the law with respect to the rights of railroad bondholders. As a rule the holders of such bonds, are small investors scattered throughout the country, who generally pay one hundred cents



on the dollar for their securities, and who are dependent upon the small income derived therefrom, in the hope and belief that their principal, at least, is secure. If the railroad company fails and its properties are sold under foreclosure for less than the amount of the mortgage bonds, the loss under such circumstances to the bondholders is particularly severe. In the case at bar the bondholders only got back about 53 cents on the dollar. On the other hand, the material and supply creditors, are generally firms or corporations actively engaged in furnishing merchandise to railroad corporations, amply equipped with the means of acquiring credit information and willing to take a business risk in extending credit, in exchange for which they expect, and receive, a very substantial profit. The face amounts of their claims, therefore, do not by any means represent, as is generally the case with the bondholders, a complete out-of-pocket loss.

Every decision, therefore, that extends to new limits the doctrine of equitable preference of material and supply claims over those of bondholders, mitigates against the security of such bonds for investment purposes, and renders increasingly difficult that financing of new railroad construction, which is so essential to the proper development of this country, and particularly the Western portion thereof.

*We, therefore, repeat that unless this Court can find in the record before it some special or extraordinary circumstances justifying the relaxation of the customary rule, which was expressly adopted in this*

*Circuit, and by this Court in the case of Spencer vs. Taylor Creek Ditch Company (supra) and which limited preferences, to such claims as have accrued within six months prior to the appointment of the receiver, it should, on this point alone, affirm the decree of Judge Dietrich.*

### **Recapitulation.**

We contend that the claim of preference of John A. Roebling's Sons Company should be disallowed for the following reasons:

FIRST: Because the material which formed the consideration of the claim was, with the knowledge of the claimant, devoted to new construction, permanent additions to and extraordinary improvements in the property of the defendant company or that of the Idaho Oregon Company, and, therefore, this claim cannot properly be characterized as a current operating expense contracted in the ordinary course of business.

SECOND: Because this claimant has utterly failed to show a diversion by the Railway Company of any income earned <sup>subsequent</sup> prior to the accrual of the claimant's debt, but, on the contrary, the record shows that the monies from which the payment of June 1, 1913, was made were derived by the company from the sale of bonds and earnings made by it prior to the accrual of such debt.

THIRD: Because the appellants' claim concededly did not accrue within six months prior to the appointment of the Receiver and the record is barren of any

special or extraordinary equities in its favor, justifying a departure from the general rule which was applied by the Court below in the exercise of its sound discretion.

We contend that the claim of preference of I. P. Morris Company should be disallowed for the following reasons:

FIRST: Because the consideration of this claim consisted in important power-generating machinery, of great value, which now represents approximately 60 per cent. of the total power generated by the plant in which it was installed, and, therefore, constituted new construction work and a permanent addition and extraordinary improvement to the mortgaged property, and cannot properly be characterized as a current operating expense incurred in the ordinary course of business of the defendant company.

SECOND: Because, if the claim be deemed to have accrued within six months prior to the appointment of the Receiver, there could have been no diversion of income as to such claim, since the payment of June 1st, 1913, made nearly *seven* months before the appointment of a Receiver, is the sole basis upon which the appellants seek to predicate such a diversion.

THIRD: Because, if this claimant contends that its claim did *not* accrue within six months prior to the appointment of a Receiver, it is debarred by the six months' rule and there are no special or extraordinary equities in its favor, justifying a departure from the general rule which was applied by the Court below in the exercise of its sound discretion.

For the above reasons, these appellees pray that the decree of the Court below be in all respects affirmed.

Respectfully submitted,

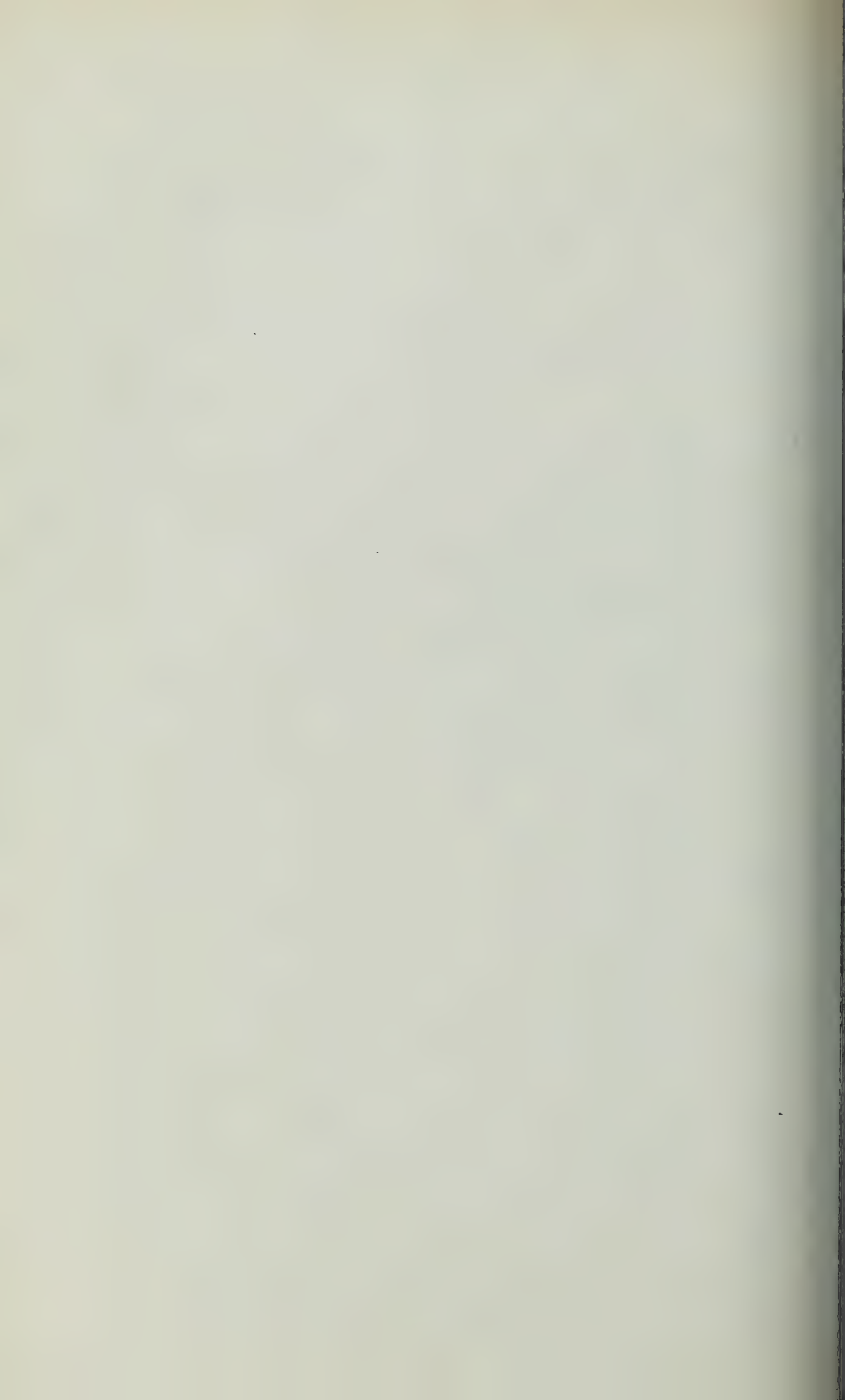
JOHN F. MACLANE,

Attorney and Solicitor for Idaho  
Railway Light and Power  
Company, O. G. F. Markhus,  
Receiver of said company;  
Guaranty Trust Company,  
Trustee, and Electric Invest-  
ment Company.

HENRY ROOT STERN,

Of Counsel.





IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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JOHN A. ROEBLING'S SONS COM-  
PANY OF CALIFORNIA and I. P.  
MORRIS COMPANY,

*Appellants,*

vs.

IDAHO RAILWAY LIGHT &  
POWER COMPANY, O. G. F.  
MARKHUS, Receiver of said Com-  
pany, GUARANTY TRUST COM-  
PANY, Trustee, ELECTRIC IN-  
VESTMENT COMPANY, AMERI-  
CAN STEEL AND WIRE COM-  
PANY, GENERAL ELECTRIC  
COMPANY and WESTINGHOUSE  
ELECTRIC AND MANUFAC-  
TURING COMPANY,

*Appellees.*

No. 2813

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**APPELLANTS' REPLY BRIEF.**

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BEVERLY L. HODGHEAD,  
Attorney and Solicitor for Appellants.

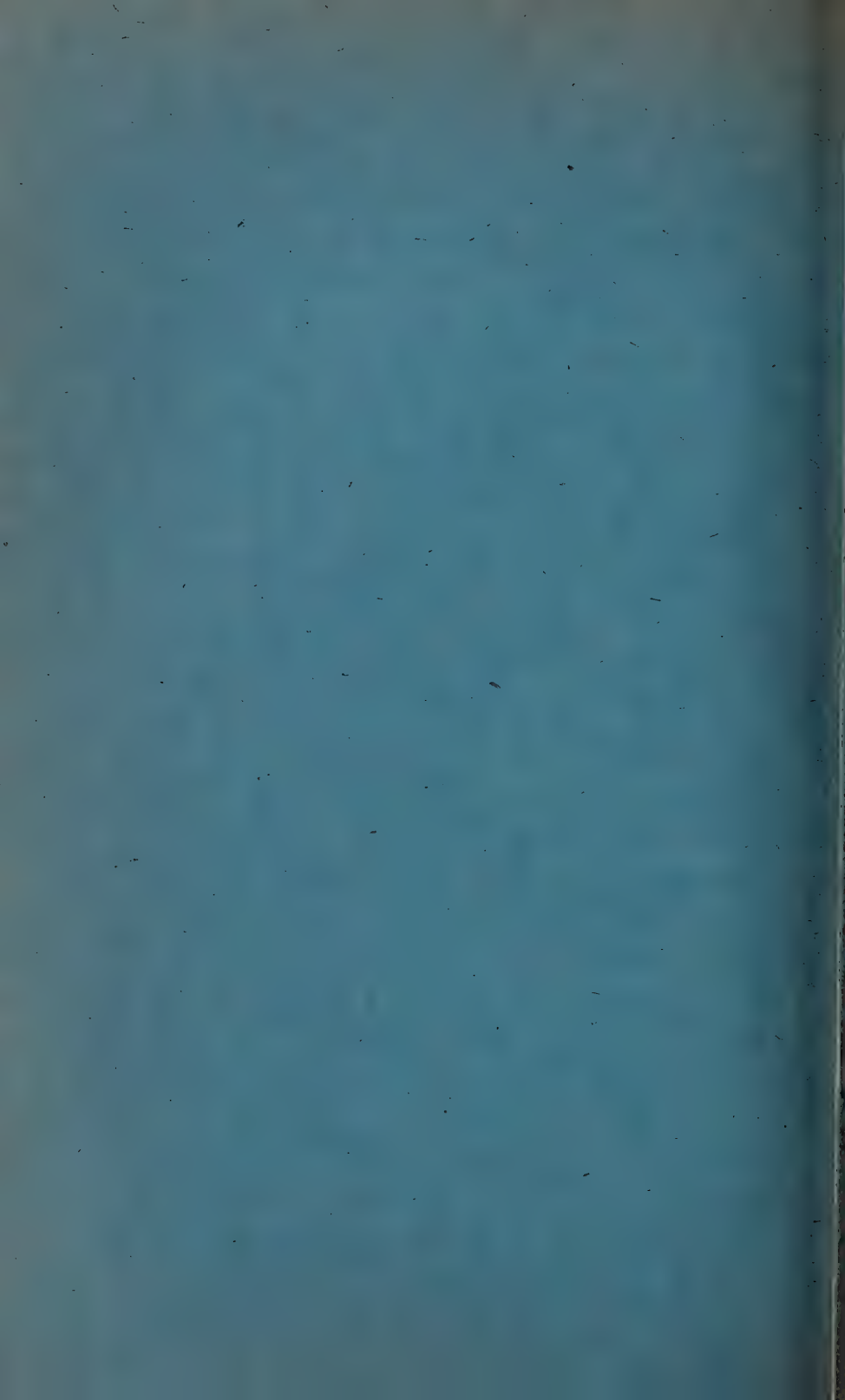
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Filed this.....day of October, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

The James H. Barry Co.,  
San Francisco



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**APPELLANTS' REPLY BRIEF.**

*Preliminary Statement.*

We think that counsels' minute and somewhat highly  
critical analysis of the facts respecting appellants'



claims of preference, do not materially alter the clear meaning and effect of the Agreed Statements upon which the two cases were tried. There is no avoiding the issue that the principal question for determination upon this appeal and which respective counsel in drafting the Stipulations of Facts attempted to present, is whether the material and supplies furnished to the Railway Company, when taken in connection with the extent and value of its properties, and of the subsequent diversion to the use of the bondholders of the earnings from which it was expected that payment would be made, may reasonably be considered to be of the character for which preference may equitably be granted.

Counsels' construction of the Agreed Statements of Facts in respect to the claims of both appellants would seem to convert them into meaningless stipulations. The argument that the supplies or materials furnished cannot be considered in relation to the whole system of which they form a part, but only in connection with the particular branch in which they were used, departs from the rule of the decisions and from clear effect of the admitted facts.

Counsel for appellees also earnestly contend for the rule, that where preference is claimed by reason of the wrongful diversion of funds, only that income can be considered which was earned *after* the debt had matured; and further, that it is necessary to show, not only that the claimant, but also the railway com-

pany, expected payment from current income. These contentions, if sound, would practically defeat all claims of preference and destroy the doctrine which equity has established and carefully guarded. We earnestly ask the Court's attention to a brief consideration of the soundness of these views.

Without entering upon a detailed reply to all the various topics discussed by counsel, as above outlined, it would seem sufficient to observe that there are two main considerations which distinguish the authorities upon which appellees rely, and which distinctions are recognized in the cases themselves. These are: First. The authorities which counsel urge impose such rigid restrictions upon preferential claims are, we think, *without exception cases in which there was no diversion of income*, but where it is sought to charge the corpus of the estate with the payment of the claims, which to that extent would displace the mortgage lien. Such cases therefore have little application here. And, second. The material and supplies furnished by appellants is treated only in the relation, or *mathematical percentage*, which it bears to the Gem Transmission Line in the one case, and the Swan Falls plant in the other, almost infinitesimal portions of the comprehensive and admittedly interdependent system of properties belonging to the Railway Company, instead of its relation, as in all other cases, to the system itself.

## BASIS OF APPELLANTS' CLAIMS.

The whole doctrine of equitable preference is found expressed in the language of the Supreme Court in *Fosdick v. Schall*, and repeatedly in later cases, that

“the power rests upon the fact that in the administration of the affairs of the company the mortgage creditors *have gotten possession of that which in equity belongs to the whole, or a part of the general creditors*. Whatever is done therefore, must be with the view *to a restoration by the mortgage creditors of that which they have thus inequitably obtained.*”

Were appellants seeking to take from the mortgage creditors something upon which the latter had a prior lien, we must confess there would be greater force in counsels' argument, but we are not attempting that. We are only trying to get back what *they* have taken. It is not necessary here to dispute their authorities. The claims of preference here are based chiefly upon the *wrongful diversion of the income and earnings intended and available for the payment of these claims*, upon which the bondholder had no lien and which were diverted, after these obligations were incurred, to the payment of interest on the mortgage. Upon this question of diversion of income, admittedly the chief reliance of appellants, the brief of counsel is practically silent.

*The mortgagee has no lien upon the current income*

*until reduced to possession through the appointment of the Receiver.* This is elementary. Before that time the current income was available for current needs. This rule was recognized by Judge Dietrich in this case, as explained by counsel for appellees, by refusing to impound for the benefit of the bondholders any of the income received, or collections made, prior to the date of filing the suit in foreclosure, December, 1914. But if the money which was diverted and paid in interest on June 1, 1913, had not been so paid, it would have then remained a part of the fund available under this decree for creditors' claim. It was held by the Court below that the bondholder was not entitled to any of the earnings or collections prior to the date of his suit. Then why is he entitled to retain the sum so wrongfully diverted? He had no lien upon it until reduced to possession through the institution of foreclosure proceedings and the appointment of receiver. The bondholder, however, has the money, which was paid on June 1st, *from the earnings of the corporation because*, having practical control of the Railway Company and being "with respect to finances, its managing director," *he took it*, notwithstanding the fact that the claims for material and supplies which it is agreed *were necessary to the continued maintenance and operation* of the various properties, were left unpaid.



## THE EQUITIES OF THE CLAIMS.

*The manager, or head of the syndicate owning the bonds was the managing director of the Railway Company with respect to its finances (Tr., p. 118). As the purchasing order came from New York, there is no escape from the conclusion that it came from this managing director who was also in control of the bondholders' syndicate. The material "has become a part " of the Railway Company's system, has enlarged the " same and has contributed to the earnings and to the " value of the properties and to the security of the " bonds" (Tr., pp. 49 and 72). It is a part of the property which was sold under decree of foreclosure. In April and June of 1913, after the obligations had been incurred and the debts created, and "while the material was being supplied," the corporation had accumulated and had on hand \$115,550 derived solely from earnings and available for paying these claims. "It was intended and agreed between the parties that the sale should be a cash transaction" (Tr., p. 42). There was no other fund from which payment could be made. The claimants believed, and the Railway Company allowed them to believe, that the claims would be paid in cash out of "current operating income" (Tr., p. 43). The bondholder had no lien upon this \$115,000 or any part of it, because not reduced to possession. Notwithstanding this, the \$115,000 was diverted and paid by the bondholders*

*to the bondholders, after the debts had in this manner been created or incurred. The bondholder received the benefit of the material which enhanced his security to the extent of its value, and at the same time secured and retained the earnings of the property intended for its payment. These are the circumstances, which we shall attempt to elaborate and confirm a little more in detail, under which appellants are seeking a preference or, more strictly speaking, a restoration of what the bondholder "thus inequitably obtained."*

*It seems that almost every argument advanced by counsel regarding the character of the material, the necessity of its use, and the extent of the Railway Company's system, is answered in direct terms by the language of the Agreed Facts. It is argued that the material was not necessary to the operation of the property, but the Stipulations admit that it was, and without it the Railway Company could not perform its duties to the public (Tr., p. 72). It is argued that it was only necessary to the operation of the Swan Falls plant and of the branch transmission line. But the admission is, that these are parts of the whole system, and that the Railway properties consisting of an "undivisible power system," and "an undivisible railway system," are used "in connection with said power and railway properties" (Tr., pp. 99 and 100).*

## THE DIVERSION OF THE INCOME.

First, with reference to the diversion of the current income. It is urged that the burden of showing such diversion is upon the claimants, and many authorities are cited. This principle, however, we concede, but reply that the wrongful diversion is clearly established by the Agreed Statement of Facts. Counsel contend, however, that claimants seeking a preference cannot complain of diversions of current income made prior to the creation of the debt. This is also strictly true, but the rule has no application here. If by this is meant, as counsel seems to contend, that it is only the income *earned after the debt became due* upon which claimant may assert an equitable lien, then we think this is an erroneous conclusion of law, but if it is intended only to mean that the debts for which the claimants herein are seeking a preference, were *incurred* after the *diversion* complained of, then it is a mistake of fact. It is not the time when the debt *matures* which controls the right of preference, but the time when it was *incurred* or the material supplied. *Foster on Federal Practice*, p. 962, says the debt must have been "incurred before the diversion."

It may be admitted that if the diversion was made before the obligation was created, the claimant could not complain, because as to him, there was no wrongful diversion. The Court will not restore to a claimant what he was never entitled to. But if when the

debt was incurred, whether due or not, there was on hand sufficient funds derived from earnings to pay the claim and from which payment was intended, and these, or the earnings subsequently accruing, are diverted to the use of the bondholder, the creditor may seek a restoration. In the Roebbling claim the material was supplied between the 18th of March and the 30th of May, 1913 (Tr., p. 42). The total amount of net earnings diverted and paid to the bondholders for interest, principally on June 1st, was \$115,550, which left the Railway Company without funds to pay these claims. The Agreed Statement of Facts recites that the Railway Company was setting up reserves from its earnings "during the period when said supplies were furnished" (Tr., p. 43).

In the case of the Morris Company claim the debt was contracted or created in the fall of 1912. The net earnings from the Railway Company after this debt was incurred are shown in the transcript at page 71, and would have been available for the payment of the Morris claim but for the wrongful diversion in April and June, 1913.

It is claimed, however, that a portion of the Morris claim did not become due until after the diversion of interest complained of, which may be true, but we think is immaterial. If the preferential claimant can only assert an equitable lien on the income which is earned after the debt became due, then a debt admittedly of a preferential character incurred imme-



diately before the appointment of receiver, would be defeated, while those incurred earlier in point of time would be preferred. This is made plain by the most recent decision of this Court in the case, cited by counsel, of *Moore v. Donahoo*, 217 Fed., 186, where Judge Dietrich, speaking for the Court, said:

"The appellants insist upon the former standard; that is, that there can be no diversion as to any creditor until his claim becomes due. In that view, if we suppose that employes upon monthly salaries, payable upon the 10th day of each succeeding month, render services to a corporation during a given month in expectation that they will be paid out of the current income, which they help to create, and upon the 1st day of the following month such income is applied to the payment of claims for betterments, and thereupon the mortgagee commences a suit in foreclosure and procures the appointment of a receiver, it is clear that the employes are left remediless. Again, under such a rule, what relief is available for those who supply materials or perform labor during the month immediately preceding a receivership, in a case where the current revenues for that month are applied to the satisfaction of similar claims accruing during the preceding month, which have remained unpaid because of the diversion of the current revenues for that month to the discharge of interest on bonds? And, generally speaking, it would inevitably result that *claims most recently accruing*, and therefore most clearly entitled to protection, would least often

be in a position to demand a restoration of diverted funds. It is doubtless true in actual practice that credit is extended for current supplies and for labor upon the assumption that there has been no improvident diversion of the current income in the immediate past quite as often as upon the expectation that there will be no such diversion in the immediate future."

In *Burnham v. Bowen*, 111 U. S., 776, the debt for which the Supreme Court decreed a preference should be granted, though contracted for, had not matured when the receiver was appointed. The Court said, p. 782:

"When, therefore, the Court took the earnings of the receivership and applied them to the payment of the fixed charges on the railroad structures, thus increasing the security of the bondholders at the expense of the labor and supply creditors, there was such a diversion of what is denominated in *Fosdick v. Schall* the 'current debt fund,' as to make it proper to require the mortgagees to pay it back. So far as current expense creditors are concerned, the Court should use the income of the receivership in the way the company would have been bound in equity and good conscience to use it if no change in the possession had been made. This rule is in strict accordance with the decision in *Fosdick v. Schall*, which we see no reason to modify in any particular."

The cases cited by counsel on this point, when examined carefully, do not appear to contradict this principle. In *Fordyce v. Kansas City Railway, etc.*, 145 Fed., 544, the Court holds that the *diversion* by the railroad company of net income, etc., "must have been made after the creation of the debt sought to be enforced as an equitable lien," which was this case. See 3d syllabus.

Also in *Kansas Loan & Trust Co. v. Electric Ry. Co.*, 108 Fed., 703, the Court said:

"The creditor can only concern himself about *diversion* of the current earnings after the creation of a debt."

It is not the earnings which *accrued* but the earnings *diverted* after the creation or maturity of the debt, which the cases refer to. Any other rule would lead to the absurdity pointed out by Judge Dietrich in *Moore v. Donahoo*, above cited.

Counsel for appellees will readily concede that the cases upon which they chiefly rely are the *Kneeland* and *Thomas* cases, *Porter v. Bessemer Steel Co.*, *Toledo v. Hamilton*, and *Wood v. Guaranty Trust Co.* (pages 14 and 15 of their brief), the *Gregg* case (p. 58), and *Spencer v. Taylor* (p. 61), and the other citations from the text of *High on Receivers* and *Street on Equity Practice*.

*These are all cases in which there was no diversion of income and therefore no "superior equity in the*

*claimants.*" They were cases in which claimants were attempting to displace the mortgage lien and charge the corpus of the property with the payment of their claims. This fact alone seems to distinguish them from this appeal.

The cases which establish the rule of preference where there is a wrongful diversion of income and the injury of the supply creditors are *Fosdick v. Schall*, *Burnham v. Bowen*, *Southern Ry. v. Carnegie*, *Virginia and Alabama Coal Co. v. Central Railroad Co.*, and other cases on page 46 of our opening brief, which we will refer to later.

In the Carnegie case, 176 U. S., at p. 284, it was said:

"In neither the Kneeland nor the Thomas cases was there any intention to question the prior decisions of the Court, which allowed priority to claims, etc. . . . against the surplus income arising during the operation of the road."

It is also urged with some earnestness that in order to establish a claim of preference, the burden is upon the claimant to show that both parties, and not the claimant alone, understood or intended that payment was to be made out of the current income, and following this statement of the rule is a minute and critical examination of the Stipulation of Facts from which counsel concludes not only that the Railway Company did not intend payment from this source, but



*notwithstanding the Agreed Statement to the contrary*, it is doubtful if claimants themselves expected payment from the current income. Without going into a tedious analysis of the figures given, it would seem to be sufficient proof that claimants expected payment to be made from the current earnings, that it is so agreed in the Stipulation of Facts, and that it was reasonable to expect payment from that fund appears from the fact, also admitted in the Agreed Statement, that there was at all times until the wrongful diversion thereof, ample money on hand, derived from current income, to pay these claimants, as well as the claims of the two or three others who did not appeal because of the insignificant amounts involved.

But that it is not necessary for claimants to prove both parties intended payment from the current income, appears from the decisions and from the logic of the rule itself. The requirement that the claimant himself must have intended payment from the earnings is but the equivalent of the rule that the sale must have been made upon the personal responsibility or credit of the railway company or upon security.

The Supreme Court decided in

*Virginia & Alabama Coal Co. v. Central R. R. Co.*, 170 U. S., 356,

that it was only necessary as to that matter for it to appear that "it was the expectation of the *creditors* that the indebtedness created would be paid out of

the current earnings of the company." See page 368, where it is said:

"The dominant feature of the doctrine, as applied in *Burnham v. Bowen*, is that where expenditures have been made which were essentially necessary to enable the road to be operated as a continuing business, and *it was the expectation of the creditors that the indebtedness* created would be paid out of the current earnings of the company, a superior equity arises in favor of the materialman as against the mortgage bonds, *in the income* arising both before and after the appointment of a receiver from the operation of the property."

This language was quoted and approved in the *Carnegie* case, 176 U. S., at p. 285. In *Moore v. Donahoo*, 217 Fed., at p. 184, the Court said:

"So with the unsecured claimant: Such equity as he may have flows from the fact that, in the ordinary course of business, he has performed labor or furnished necessary supplies to the railroad company *with the reasonable expectation of being paid therefor from certain funds.*"

The reference to "all parties" relates to the implied understanding of the mortgagee that such debts are to be paid before the mortgage.

In *Foster's Federal Practice*, Vol. I, at page 961, it is said:

"It must appear, however, in all cases, that the *creditor allowed* the debt to be incurred in the belief that it would be paid from the current earnings of the railroad, and that he did not rely solely upon the personal credit of the corporation with whom he made the contract, and *that the debt was one fairly to be regarded as part of the operating expenses of the railroad*, in current receipts,"

Citing:

*Southern Ry. v. Carnegie Co.*, 176 U. S., 290;

*Lackawanna Ry. Co. v. Farmers Loan & Trust Co.*, 176 U. S., 298;

*Virginia and Alabama Co. v. Central Ry. Co.*, 170 U. S., 335;

*Southern Ry. v. Ensign*, 117 Fed., 417.

In the last of these, the *Ensign* case, it is said (p. 421) that among the things necessary in order to give a claim preference over the mortgage lien is, second,

"*that the person furnishing them* relied upon the interposition and protection of his equity by the court, and did not contract upon the personal responsibility of the railroad company";

We do not at all agree with counsels' construction of the language quoted from the case of *Southern Ry.*

v. *Carnegie*, 176 U. S., 290. The Court said that it appeared from the circumstances of that case that both parties contemplated payment from the current earnings, but it nowhere intimated that it was necessary for it to so appear. On the contrary, the Court said, p. 290:

"The parties did not in express words declare that the debts due contracted with the Carnegie Company were to be charged upon the current earnings of the railroad company."

and

"There is nothing in the record to show that the Carnegie Company relied merely or exclusively on the personal credit of the railroad company."

Also, as above stated, the Court, it will be seen on page 285, approved the language of the previous decision in *Burnham v. Bowen* and *Virginia Coal Co. v. Railway Co.*, that where

"It was the expectation of the *creditors* that the indebtedness created would be paid out of the current earnings of the company, a superior equity arises, etc."



CHARACTER OF THE MATERIAL AND SUPPLIES FOR  
WHICH PREFERENCE IS HERE CLAIMED.

In this connection the question which arises is this: Was the material for which appellants claim a preference necessary to the maintenance and operation of the Railway Company's property? We freely admit that there may and often does arise a doubt as to whether material must be considered as intended for construction only, as in the *Lackawanna* case, or whether the same material when taken in relation to the entire system of properties may not be treated as in the nature of maintenance and supply, as in the *Carnegie* case. But we respectfully urge that the question in this appeal is concluded by the Agreed Statements of Facts, and by the testimony of Mr. Markhus, the local manager of the property under the financial direction of the syndicate owning the bonds, who with Mr. Fuller the financial director were the only witnesses in the case. Is it asking too much of the Court to resolve any doubt in accordance with these admitted facts? The agreed Statement is as follows. In the Roebling case:

"Said material is and was necessary to the continued maintenance and operation of the respective parts of said property for which the same was applied and in which it was used" (Tr., p. 49).

and in the Morris claim:

“That such machinery is necessary to the continued operation of the Railway Company’s *system*, and that without it it could not perform its duties to the public” (Tr., p. 72).

Counsel for appellees (p. 32) charge that the appellants have “seized” upon this sentence to support their contention. It is true, that we rely upon it, but inasmuch as the Stipulations of Facts was agreed upon, after many modifications and careful revision in order to avoid a protracted trial of the issues involved, and as this provision quoted was the most material part of the Stipulation, it is not quite appropriate to charge that counsel has “seized” upon it. It is true also that Judge Dietrich limited its application to the “new parts of the system,” but that is the reason we are appealing, because in this we must respectfully urge that the lower Court erred in its construction of the Stipulation. What is true in one case is true in the other, and in the case of the Morris Stipulation it was *agreed* that the machinery was necessary, not to the operation of the “new parts,” as said by Judge Dietrich, but it “*is necessary to the continued operation of the Railway Company’s system.*” It is further admitted, as pointed out in our former brief, that the whole property of the Railway Company, “the indivisible railway system” and “the indivisible power system,” of which this material now forms a part, are

interdependent and used in connection with each other; that is, that the "*single indivisible electric street and interurban railway system with properties appurtenant to,*" are "*used in connection with said power and railway properties*" (Tr., p. 100).

It was alleged in the original bill for the appointment of Receiver and admitted in the answer of the Railway Company, as follows:

"That to segregate either the power properties or the traction properties into their component parts, would be attended with great difficulty and cause great loss and waste, and cause great increase in operating expenses, and diminish the security of the bondholders and general creditors" (Tr. pp. 13 and 22).

If the properties are to be treated as a whole, and, as admitted in the Morris claim, are "necessary to the continued operation of the Railway Company's system," we claim it was error to limit the consideration of the case to the operation of the Gem Transmission Line in the one case and the Swan Falls Power Plant in the other. If these alone constituted the whole system of the Railway Company's property, it may be admitted that the quantity of material supplied was too large to be considered in the nature of supplies; but such is not the rule of law, and such is not the fact, for the Agreed Statement admits that the material and supplies were necessary, not to "construction," but to "the maintenance and operation."

We urge, therefore, that the nature of the material must be considered with relation to the system as a whole. In the *Carnegie* case, a claim for 2500 tons of *steel rails* was allowed a preference, because

“the quantity was not so large as to preclude the expectation that they could be paid for out of the current earnings of the railroad” (176 U. S., 290).

On the other hand, in the *Lackawanna* case, decided at the same time, a claim for *steel rails* was denied a preference on the ground that the quantity was so large that, relatively speaking, it amounted to reconstruction. If steel rails may be considered to be intended to be for construction in the one case and for supplies in the other, according to its relation to the *entire system*, the same rule may be applied to copper wire or machinery. Here, the amount of the claims is insignificant, when compared with the value of the whole properties of the Railway Company, which are interdependent, and which supply transportation, light and power to the inhabitants of a large portion of southwestern Idaho (Tr., pp. 9 and 22).

To illustrate further: A steel rail supplied to the Southern Pacific for a short branch road out of Los Angeles would not be necessary to the maintenance and operation of the “Shasta Limited,” but the claim for preference in such case would not be denied because the rail was necessary only to the operation of the particular branch of the Southern Pacific system of



which it formed a part. It would be treated as in the *Carnegie* case, in relation to the whole property of the railway company. It would scarcely be possible to imagine a single order of this magnitude which would be necessary to the operation of an entire railway and power system. So we respectfully urge that the construction placed upon this, the most material clause of the Agreed Statement of Facts, is erroneous and is against the decisions and the clear meaning of the Stipulations on which the cases were tried.

This provision in question was inserted, not to show that the material was necessary only to the operation of the Gem Transmission Line or the Swan Falls Plant, but by reason of the fact that a portion of the material was used by the plant of the Idaho-Oregon Company, and as to that material it was necessary for the maintenance and operation of that property to which we will refer later; but to hold that the material was intended for construction purposes only, *when the parties concerned, agreed by their stipulation that it was for maintenance and operation*, or to hold that it was necessary only to the "new parts" alone, when, by a fair construction of the Stipulation, it is agreed that it is *necessary to the "system," would be to hold contrary to the Agreed Statement and to the undisputed evidence*. When the amount of the material is compared with the extent and value of the Company's system, and the amount of earnings actually available, it is reasonable for the parties to

conclude that the claims were properly payable from the current operating income.

As to the property that went into the Idaho-Oregon plant, the Railway Company retained the title. It was covered by the mortgage and, to the extent of its value, added to the security of the bonds. It was necessary to the maintenance and operation of that property, which was in fact managed and controlled by the Railway Company. It was intended that it should be paid from the earnings, which the Railway Company had a right to do because the lien of the mortgage did not attach to the income until the appointment of receiver. For this reason the material furnished under the "Equipment Trust" is included in the claim of preference.

#### THE AUTHORITIES.

I again call the Court's attention to the distinct holdings of the Supreme Court and the Courts of Appeal upon claims of preference which are not intended to displace the mortgage lien by a charge upon the corpus of the property, but which are based upon *wrongful diversion* of earnings to the benefit of the mortgagee and to the injury of the claimant, thus giving the bondholder not only the benefit of the material itself but also the income intended for its payment. In such cases the rule as to the nature of material is less rigid, and equity inclines to the restoration of that which the mortgage creditor has "inequitably ob-

tained." In addition to this rule, the special equity in this case which we claim should appeal to the Court and which we confess was not as fully presented to the lower Court as in these briefs, is the uncontradicted fact that Mr. Samuel L. Fuller, the head of the syndicate owning the bonds and which received the benefit of the earnings was, at the time of the diversion complained of, the managing director of the Railway Company "with respect to finances" (See opening brief, p. 30, and Tr., pp. 118 and 130, 131).

Reviewing a few of the leading cases which deal with the subject of diversion of earnings as distinguished from the cases cited by appellees, which relate to the displacement of the mortgage lien.

The rule applicable to the case before the Court is nowhere more clearly stated than in

*Virginia & Alabama Coal Co. v. Central R. R. Co.*, 170 U. S., 356.

The opinion written by present Chief Justice White reviews the prior cases, states the equitable rules and approves those given in *Fosdick v. Schall*. The principles established seem peculiarly applicable to the facts of this case as recited in the agreed statement. It is said (p. 368):

"The dominant feature of the doctrine, as applied in *Burnham v. Bowen*, is that where expenditures have been made which were essentially

necessary to enable the road to be operated as a continuing business, and it was *the expectation of the creditors that the indebtedness* created would be paid out of the current earnings of the company, a superior equity arises in favor of the materialman as against the mortgage bonds in the income arising both before and after the appointment of a receiver from the operation of the property."

From the above statement of law it will appear that if, as the stipulation provides, the "said material is and was necessary to the continued maintenance and operation," and it "was the expectation of the creditors that the indebtedness created would be paid out of the current earnings of the company," as the agreement also provides, then the allowance of this claim out of the income or earnings of the company or, if the income has been diverted, then from the corpus of the property, *is not the displacement of the mortgage lien*, but, as stated by Mr. Justice White, is the assertion of "*a superior equity in favor of the materialman as against the mortgage bonds in the income.*"

The following extract from the same opinion of Mr. Justice White in the *Virginia Coal Co.* case has direct bearing upon the objections of counsel concerning the portion of the property supplied to the Idaho & Oregon Company under the so-called "Equipment Trust." It is said (p. 369):

"We conclude from the terms of the contract



that the intention of the parties was that the coal was to be used in the operation of the lines of the Central Company, and that the mining companies did not rely simply upon the responsibility of the Danville Company, but on the contrary that the coal companies looked to the earnings of the Central system as the source from which the funds to pay for the coal to be furnished was to be derived."

In this case the Roebling Company looked to the earnings of the Idaho Railway Light & Power Company, the defendant herein, for payment for all material supplied. It is so stipulated in the Agreed Statement (p. 2).

In the review found in the above case of *Miltensberger v. Logansport Railway*, 106 U. S., 206 (which Mr. Justice McKenna in the *Gregg* case states is the leading case in the Supreme Court on the subject of preferential claims), Mr. Justice White says a preference was allowed over the lien of the mortgage, among other things, "To pay debts incurred for building the *five miles of road and the bridge*." Building five miles of road and a railroad bridge would, under some circumstances, be considered new construction, but the claim in the *Miltensberger* case was allowed a preference because the material was necessary to the maintenance and operation of the road.

The Court in the *Virginia Coal* case also points out that in the *Kneeland* case priority was denied because

"ample provision had been made by the vendor for his security," and because "*there had been no diversion of the current earnings either to the payment of interest or the permanent improvement of the property*" (p. 371).

In the *Gregg* case, which has been referred to as the latest decision of the Supreme Court on this question, Mr. Justice Holmes, speaking for the majority of the Court, says (p. 186):

*"The case stands as one in which there has been no diversion of income by which the mortgagees have profited, or otherwise."*

And again (p. 187):

"Cases like *Union Trust Co. v. Souther*, 107 U. S., 591; 27 L. ed., 488, 2 Sup. Ct. Rep., 295, where the order appointing the receiver authorized him to pay debts for labor or supplies furnished within six months out of income, *stand on the special theory* which has been developed with regard to income, and afford no authority for a charge on the body of the fund."

Citing

*Fosdick v. Schall*, 99 U. S., 235; 25 L. ed., 339;  
*Burnham v. Bowen*, 111 U. S., 776; 28 L. ed.,  
 596; 4 Sup. Ct. Rep., 675;  
*Morgan's Louisiana & T. R. & S. S. Co. v.  
 Texas C. R. Co.*, 137 U. S., 171; 34 L. ed.,  
 625; 11 Sup. Ct. Rep., 61;

*Virginia & A. Coal Co. v. Central R. & Bkg. Co.*, 170 U. S., 355; 42 L. ed., 1068; 18 Sup. Ct. Rep., 657;  
*Southern R. Co. v. Carnegie Steel Co.*, 176 U. S., 257; 44 L. ed., 458; 20 Sup. Ct. Rep., 347.

It is also said, "it is agreed that the petitioner may have a claim against surplus earnings, if any, in the hands of the Receiver."

In the *Gregg* case the claim for which preference was denied was for railroad ties supplied, *but which had not been used* when the Receiver was appointed. The Court says:

"The material point is not the time when they were used but the time when they were acquired."

In

*Union Trust Co. v. Souther*, 107 U. S., 591,

there was a diversion of the income which, the Court says,

"Instead of being applied in accordance with the order to pay the debts for the supplies and labor, was used with the consent, and it may fairly be inferred, at the request of the bondholders to buy additional grounds, rolling stock, etc.";

and in this connection the Court further said (p. 595):

"It seems to have been found, in the administration of the cause, that by using the income to add

to the value of the fixed property the interests of all parties would be promoted, and so the fund, which in equity belonged to the labor and supply creditors, was for the time being diverted from them and put into improvements and additions, the proceeds of which are now in court."

In

*St. Louis Railway Co. v. Cleveland Railway Co.*, 125 U. S., 659,

the Court says with respect to the matter of diversion of funds (p. 678) :

"On this branch of the case we conclude that the petitioner has failed to establish any diversion and misappropriation of the earnings applicable to the payment of rent of the leased line to entitle him in equity to charge the fund in court for the payment of the arrearage in preference to second and third mortgage bondholders."

Counsel seem to feel it is necessary to distinguish the case of *Fosdick v. Schall*. That case is criticised because the Court entered into a full discussion of the equitable rules which should govern the allowance of such claims. The preference was denied, because there had been no diversion of income and the material had not been added to the property or increased the value thereof. In fact it was *not a part of the property upon which foreclosure was sought*. But in the companion case of *Fosdick v. Southwestern*



*Car Co.*, 99 U. S., 256, the preference was allowed for cars which added to the value of the property and the security of the bonds and which were included in the decree of foreclosure. As the question was a new one, it is not surprising that the highest court in the land should formulate some equitable rules for guidance in future consideration of such claims for preference. It is true that much was there stated which subsequently found its way into the briefs of preferential claimants in many cases, but this is justified by the fact that substantially every principle announced in the *Fosdick* cases has likewise found its way into the subsequent decisions of the courts, and in this way has become crystallized into a rule of property. Concerning the *Fosdick* cases and the principles there announced and having peculiar application to counsel's contention that we are seeking to displace the lien of a mortgage, the Court in *Union Trust Co. v. Souther*, *supra*, says (p. 595):

"Clearly, therefore, on the face of the transaction, the *fund in court represents in equity the income which belongs to the labor and supply creditors as well as the mortgage security*, and there was no impropriety in appropriating it as far as necessary to pay the creditors specially provided for when the receiver was appointed. Such a *practice, under proper circumstances, was approved in Fosdick v. Schall, ubi supra, and seems to us eminently just.*"

It will also be observed that the principle therein announced that the Court should use the income of the receivership in the same way *that the company would have been bound in equity and good conscience to use it if no change in the possession had been made*, was expressly affirmed in

*Burnham v. Bowen*, 111 U. S., 776.

In *Union Trust Co. v. Morrison*, 125 U. S., 591, cited by plaintiff, the Court also says in this connection (p. 612):

“‘All we then decided and all we now decide is that, if current earnings are used for the benefit of mortgage creditors before current expenses are paid the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use.’ It is this remark on which the appellants rely. It is not our intention, however, to decide anything in the present case in conflict with it.”

In

*Southern Railway Co. v. Carnegie Steel Co.*,  
176 U. S., 257,

as explained in our opening brief, the claim of preference was allowed for rails furnished to the railway company, which ordinarily would constitute material for construction as much as would transmission wire. The Court emphasized the fact that the *amount in-*

*volved and the terms of payment indicated that the debt was one fairly to be regarded as part of the operating expenses of the railroad incurred in the ordinary course of business and to be met out of current receipts.*

The rule of law applicable in case three has been a diversion of income is also stated in conclusive manner in the *Carnegie Co.* case. It is said that a general unsecured creditor is not entitled to priority over the mortgage *simply* because the material furnished was for preservation of property and the benefit of mortgage security. That, it is said, is no doubt an important element; but (using the language of the Court):

“Before, however, such a creditor is accorded a preference over mortgage creditors in the distribution of net earnings in the hands of a receiver of a railroad company, it should reasonably appear from all circumstances, including the amount involved and the terms of payment that the debt was one fairly to be regarded as part of the operating expenses of the railroad incurred in the ordinary course of business and to be met out of current receipts.”

The Court, after reviewing all previous decisions, makes the following summary of the rules concerning such claims of preference (pp. 284-6):

“‘In neither the Kneeland nor the Thomas case was there any intention to question the prior de-

cisions of the Court, which allowed priority to claims based upon the furnishing of essential and necessary current supplies, not sold upon mere personal credit, against the surplus income arising during the operation of the road under the direction of a court of equity.'

"It is apparent from an examination of the above cases that the decision in each one depended upon its special facts. This court has uniformly refrained from laying down any rule as absolutely controlling in every case involving the right of unsecured creditors of a corporation, whose property is in the hands of a receiver, to have their demands paid out of net earnings in preference to mortgage creditors. But it may be safely affirmed, upon the authority of former decisions, that a railroad mortgagee when accepting his security impliedly agreed that the current debts of a railroad company contracted in the *ordinary course* of its business shall be paid out of current receipts before he has any claim upon such income; that, within this rule, a debt not contracted upon the personal credit of the company, but to keep the railroad itself in condition to be used with reasonable safety for the transportation of persons and property, and with the expectation of the parties that it was to be met out of the current receipts of the company, may be treated as a current debt; that whether the debt was contracted upon the personal credit of the company, without any reference to its receipts, is to be determined in each case by the amount of the debt, the time and terms of payment, and all other circumstances attending the



transaction; and that when current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of any funds thus improperly diverted from their primary use. The doctrine announced in *Burnham v. Bowen*—in which case the decisions in prior cases were affirmed—is thus expressed in the recent case of *Virginia & A. Coal Co. v. Central R. & Bkg. Co.* above cited: ‘The dominant feature of the doctrine as applied in *Burnham v. Bowen* is that, where expenditures have been made which were essentially necessary to enable the road to be operated as a continuing business, *and it was the expectation of the creditors* that the indebtedness created would be paid out of the current earnings of the company, a superior equity arises in favor of the materialman as against the mortgage bonds in the income arising both before and after the appointment of a receiver from the operation of the property. The equity thus held to arise when a purchase of necessary current supplies is made by the owning company is not in any wise influenced by the fact that the company itself is the purchaser of the supplies, but is solely dependent upon the fact that the supplies are sold and purchased for use, and that they are used in the operation of the road, that they are essential for such operation, and that the sale was not made simply upon personal credit, but upon the tacit or express understanding that the current earnings would be appropriated for the payment of the debt.’ ”

In

*Porter v. Pittsburgh Bessemer Steel Co.*, 120  
U. S., 649,

the preference was denied for debts for construction work, but there the Court also emphasized the statement *that there had been no diversion of income*; in fact, there had been no income at all. It will be seen by a reference to the brief that when these claims accrued the road of the company had not been open for use. Counsel also quotes from *Wood v. Guaranty Trust Co.*, 128 U. S., 416, to show that preference was denied upon a claim for construction work as against the corpus of the property. The following quotation from the opinion, however, has direct application to the question at issue, because it deals with the rule to be followed in case the income has been diverted. The Court says (p. 421):

"Secondly, it (the argument) overlooks the important fact that the doctrine (of *Fosdick v. Schall*) only applies where there is a diversion of the income of a 'going concern' from the purpose to which that income is equitably primarily devoted; viz., the payment of the operating expenses of the concern. In other words, the income must be first devoted to the expenses of producing the income. In this case it is not pretended that the money used in paying the 117 coupons in question was income of the Water Works Company."

## THE DECISIONS OF THE CIRCUIT COURT.

Upon analysis of the various decisions of the Circuit Court it will also be found that *the same distinction has been generally observed with regard to claims of preference where based upon a diversion of income to the benefit of the mortgage creditor.* As stated in our former brief, preference has not been denied where such denial would result in allowing the bondholder to retain the value of the material supplied and also the money, in the form of interest, which was intended for its payment. In fact, it will be observed that in most, if not all, the cases in which preference was denied the Court in some part of its opinion is careful to state that there has been no diversion of income.

In *International Trust Co. v. Townsend*, 95 Fed., 850, Justice Lurton, expressing the opinion of the Circuit Court of Appeals, said, and we here for convenience quote freely from the text:

“But, if there has been no diversion of the current income, either before or after the appointment of a receiver, and no ‘surplus income’ during the receivership, out of which unpaid debts of the income can be paid, upon what theory can the proceeds of a mortgage foreclosure sale be applied to the payment of such debts against the objection of mortgage creditors? If nothing has been diverted from the ‘current debt fund,’ if there has been no augmentation of the fund applicable primarily to the satisfaction of the mortgage credi-

tors, is there any just or equitable reason for requiring the restoration where nothing has been improperly received? We think in such cases the Court has no power to displace contract rights, and neither *Fosdick v. Schall* nor any of the cases which have followed it afford any sufficient authority, when rightly understood, in opposition to this view. These 'debts of the income' are an 'equitable charge' only upon the 'current income' of the mortgaged railroad. If such debts remain unpaid when the railroad passes into possession of a court of equity, this 'equitable charge' is continued, and attached to the 'surplus income' arising under the receivership. If the surplus income is not applied to the payment of the debts to which it is primarily devoted, *but is expended for the benefit of the mortgagee, as in payment of interest, or in the purchase of property which passes under the mortgage, or in betterments of the railroad itself, an equity arises, as a consequence of such diversion, which will justify a court of equity in requiring the mortgagee to restore to the income that which has been taken away. The power of the Court to displace mortgage liens in favor of such unsecured debts of the mortgagor depends upon the fact that the current income, either before or after the receivership, has been diverted to the benefit of the displaced mortgagee, and the extent to which the corpus of the mortgaged property can be called upon to pay such debts of the income is limited by the amount of the diversion."*



The case is not in material conflict with *Rhode Island Works v. Continental Trust Co.*, 108 Fed., 5, and is not overruled by the latter case. Upon careful analysis of the two cases there will be found nothing in the *Townsend* case in conflict with the *Rhode Island* case. In fact, the former case is expressly approved. All the elements or conditions prescribed by Judge Lurton are present in this case. See page 7 of opinion in *Rhode Island* case. The demand here presented is not a debt created upon the personal credit of the company but it was the expectation that it would be paid out of current receipts and there was a diversion of net earnings sufficient to pay this demand. The Court further says (p. 8):

“If the demand of appellant is to be paid at all, it must be paid out of the proceeds of the sale of the mortgaged property of the railroad company at the expense of the mortgagees. But before this can be done it must be made to appear that there *had been* a diversion of current earnings, by which this complainant has been deprived of his equitable rights, and that the mortgagees should equitably restore to the fund liable to the payment of debts of the income the fund thus diverted.”

The Court makes it clear that the claimant “took care that there should not be reliance upon the current earnings as a fund to meet the obligation” but had taken security for the claim.

In

*Central Trust Co. v. Colorado Ry. Light & Power Co.*, 200 Fed., 85,

the claim was for repairs upon certain boilers which ordinarily, it must be admitted, would be termed a current expense. But the boilers were new. They had never been used and when erected were not intended for immediate use (see p. 89). There had been no diversion of funds, and therefore no superior equity arose.

The Court said (p. 90):

"There is nothing alleged nor proven, showing as against the bondholders any equity in claimant, as, for instance, that *during the progress* of the repairs or thereafter there was any diversion of the net income of the plant to such other directions as deprived the claimant of *his equitable rights*."

In

*Niles Tool Works Co. v. Louisville Ry.*, 112 Fed., 561,

it appears from the syllabus not only that "no diversion of current income was shown" but the property for which preference was claimed "never passed under the mortgage and was not included in the foreclosure decree or sale." From the opinion it appears that there was no surplus income, and that the earnings

were not used or promised in payment, but security was taken.

In

*Reyburn v. Consumers Gas Co.*, 29 Fed., 561,

I think it substantially appears from the opinion that there was no diversion of any earnings derived from operation prior to appointment of receiver and on which creditors could be said to have a "superior equity."

In

*Atlantic Trust Co. v. Woodbridge*, 79 Fed., 39,

the opinion does not show the character of the work done nor what relation it bore to the operation of the plant. The claim for repairs was disallowed *because "there is no allegation of diversion of income, nor indeed, of the receipt of any income."* As to the claim for construction, the complaint, in effect, alleged the services were rendered in the construction of the ditches and canals and such sum was one of the current expenses in the *construction*. It does not seem that such complaint really states a cause of action.

In neither the case of

*California Safe Deposit Co. v. Yakima Inv. Co.*, 82 Fed., 542,

nor the case of

*Toledo Ry. v. Hamilton*, 134 U. S., 296,

on which exclusive authority it is based, was there any diversion of income which would create an equitable lien, nor was there any evidence that the material supplied "was necessary to the maintenance and operation of the road."

In

*Spencer v. Taylor Creek Ditch Co.*, 194 Fed.,  
635, chiefly relied on by appellees,

there is no discussion of questions of right of priority of claims. The Court merely says (p. 641) :

"We find they do not measure up to the standard required of claims admitted to priority";

that is, "*they would not have been paid by the corporation out of the current income.*"

There was no evidence nor admission that the work or material was "necessary to maintenance and operation of plant," and no evidence nor admission that current earnings out of which it would have been paid had been diverted. On the contrary, the Court found that it would not have been paid from current earnings. Such a case upon such facts could scarcely be considered authority for denying preference to a claim in present case in which it is admitted that the material was necessary to maintenance and operation and in which it appears that, as was said in *Virginia Coal Co.* case, it was the expectation of creditors that it was



to be so paid—but the funds intended for such payment were diverted.

In

*Rodgers Ballast Car Co. v. Omaha Ry. Co.*,  
154 Fed., 629,

preference was denied on claim for cost of thirty-three ballast cars on the grounds that the magnitude and unusual character of the purchase was such that it could not be assumed it was incurred in the ordinary course of business. The Court says it was "to provide for an unparalleled situation" (p. 633).

In

*Bound v. South Carolina Ry. Co.*, 58 Fed., 473,

preference was disallowed because:

"The debt of the Lackawanna Co. was an ordinary merchandise debt, *evidenced by notes*, which were renewed from time to time."

And because

"The immediate earnings, it is clear, the Lackawanna Co. did not look to as the sale was upon eight months' credit" (page 480).

The Roebling sale was for cash, the Morris sale for short credit, and the company, in each case, looked to the current income for payment (Stipulation of Facts, p. 2).

It will thus appear from a review of all the cases cited by plaintiff's counsel that there is no instance in which preference has been denied upon a claim where all of the equities possessed by these claims were present.

A controlling case from the Circuit Court of Appeals in which the material supplied was analogous in character to the Morris claim, is

*Atlantic Trust Co. v. Dana*, 128 Fed., 209.

The claim was for a *new engine* and the *cost of sinking two wells* upon the property, which the Court found was more in the nature of reconstruction and enlargement of the plant than ordinary repairs. Preference was denied upon the *corpus* of the property, there being no wrongful diversion, *but was allowed upon the income earned prior to the appointment of the receiver* (p. 230). It is there said:

"It follows that cost of the new engine and additional wells incurred under the order of January 9, 1895, should be charged against the income earned prior to March 18, 1895, when the pledge of income in Trust Company's mortgagee became effective."

It is also said (p. 226):

"It is the income earned thereafter (the appointment of receiver) and *not that earned theretofore*, that, as against creditors of mortgagor, is thus secured to the mortgagee."

It is held in this case also that a pledge of income does not become effective so long as the mortgagor is permitted to remain in possession of the property and to receive and dispense the earnings.

This case also establishes the doctrine that it makes no difference whether the claim of preference arises upon a debt incurred before the appointment of receiver or afterwards upon an order of the Court (p. 230). The claims of Dana and Whiting were denied because they were for personal injuries which did not enhance the value of the property.

Another instructive case from the Circuit Court of Appeals from the Fifth Circuit is

*Clarke v. Central Railway*, 66 Fed., 803,

in which the following language is used (p. 806):

“In this case the equities are especially favorable to interveners for it appears that there was a diversion of the income for payment of interest on the bonds.”

Reverting to the *Gregg* case and comparing it with this, two distinctions are to be observed. First, the Court states at the outset “that the case stands as one in which there has been no diversion of income by which the mortgagees have profited,” and, second, the cross ties which formed the basis of the claim had not been used by the railroad when the receiver was appointed and that it was immaterial that the

receiver had used them afterwards. Justices McKenna, Harlan and White thought the claim should be allowed a preference anyway. There is certainly little doubt but preference would have been allowed if in that case there had been a previous diversion of the funds intended for the payment and material had been previously used upon the property.

#### THE SO-CALLED SIX MONTHS RULE.

As counsel says, there are some cases which hold that there is a "six months" rule, but on the other hand there are many cases, probably a numerical majority of those cited and particularly from the Supreme Court, which hold that there is not. It is not quite accurate to refer to the decisions of the Supreme Court of the United States which establish a definite rule, as "sporadic instances." It is not disputed by counsel that claims have been allowed which accrued *eight months, eleven months, two years, three years*, and in this Circuit, *twenty-six months*, before the appointment of a receiver (See pp. 33 to 38 of appellants' opening brief). In some cases it is said that the period is "usually six months," but admit that it is not a "fixed rule." In *Farmers Loan & Trust Co. v. Kansas City*, 53 Fed., 87, the Court says: "There is no 'six months' rule." In *Railroad Co. v. Lamont*, the Court says: "As to such debts there is no arbitrary six months rule as has been often decided."

*Decisions from the Ninth Circuit.*



There are two decisions from the Ninth Circuit which, when examined closely, are not in conflict, as claimed, viz.:

*New York Guaranty & Indemnity v. Tacoma Ry. Co.*, 83 Fed., 365,

and

*Spencer v. Taylor Creek Ditch Co.*, 194 Fed., 635.

In the first case the preference was *allowed* on a claim for material which the Court says was *purchased more than two years* before the appointment of receiver. Counsel for appellees contend that this time should be reduced to one year, and let that be conceded for the argument. In the *Spencer* case the time was about a year also. In the *Tacoma* case the claim was *allowed*, the Court saying "there is no fixed arbitrary rule," and in the *Spencer* case the claim was *denied*, the Court saying nothing on this point, except to refer to a decision of Justice Harlan, decided nearly ten years before the decision of this Court in the *Tacoma* case, in which Judge Harlan adheres to the six months rule in that particular case, but says:

"The Court has perhaps not committed itself against applying a different and more liberal rule when the special circumstances or equities of the case demand such course,"

which is equivalent of the language of this Court in the *Tacoma* case, where it is said "there is no fixed or arbitrary rule." If the Court in the *Spencer* case had allowed the claim because claims of that age were entitled to allowance, then there *would have been a fixed and arbitrary rule* that all such claims, if they possessed the other equities required, must be allowed. We do not dispute the power of the courts to deny preference to a claim which is twelve months old, but we also contend that the Court has the power to *allow it*, and where the almost unparalleled equities are present, as in this case, there is certainly sufficient special circumstances to justify the allowance, as practically all the authorities concede may be done. The Roebling claim was about seven months, or, as counsel contend, from nine to seven. The time is fixed from the appointment of receiver, but this, as said by the Court in *Moore v. Donahoo*, 217 Fed., 184, is a "circumstance wholly fortuitous" and yet which may be entirely controlling. The Court says:

"His power to enforce his rights should not be made contingent upon the possibility that the secured creditor may apply to a court for the appointment of receiver or for other equitable relief, a circumstance wholly fortuitous or at least one over which he exercises no control."

In the present case, had the receiver been appointed in November, no question would have arisen about the six months rule, but the application was not

made until December, and as pointed out in our opening brief, the Railway Company, of which the bondholders' manager was the managing director, joined in the prayer for the appointment. As upon examination it is found there is no conflict between the two decisions from this Circuit, it would seem that the question would be settled by the *Tacoma* case, 83 Fed., 365, which discussed the question at length and approved the rule and based its decision upon a series of cases in which claimants were allowed a preference upon claims from 1 to 3 years old and in which the Court stated as follows:

"A preferential debt is not barred, though contracted more than six months before the appointment of a receiver. As to such debts, there is no arbitrary six-months' rule, as has been often decided."

Judge Harlan in the case cited in the *Spencer* decision says that the reason some period must be fixed is, that "it may be fairly presumed that creditors have ceased to look to current receipts for payment." That doctrine would have little application in this case in the face of the stipulation that the appellants expected payment from the current receipts. It is shown (Tr., p. 120) that the Roebblings refused to accept notes, and (Tr., p. 55) that the Morris were not given or received in payment.

Counsel replied to the argument that a claim 11 months old was allowed in the *Carnegie* case by saying

that the Court referred to what Judge Brewer said in *Blair v. St. Louis R. R.*, 22 Fed., 474, decided in 1884, (the same year as *Burnham v. Bowen*), that at that time he had no notice of any case exceeding six months, and "*ordinarily I think this is ample. Perhaps in some large concerns, and with extensive lines of road and a complicated business, a longer time might be necessary.*"

Judge Brewer, as will be observed, here admits that the rule is not inflexible.

It is not to be assumed that the Supreme Court of the United States in the *Carnegie* case would decide that the "six months rule" was absolute, and in the same case allow a claim *eleven* months old. But the Court in that case did not leave the question open. It laid down the rule definitely on the point, which was not a "sporadic instance." The rule there given is at variance with the *Spencer* case, as that case at least is construed by counsel for appellees. The Court decided the question in the following language (see 176 U. S., p. 192):

*"But no absolute rule on the subject has been prescribed by statute or by judicial decision and a claim accruing six months back of the appointment of receiver may, under the circumstances of particular cases, be accorded the same priority in the distribution of earnings that belongs to like claims arising within that period."*



With this decision, which has not been limited in any way by the Supreme Court, and could not be modified by the Circuits, we submit the question as to the power of the Court to allow preference in a claim which is a month or more outside of the so-called "six months" period. If any special circumstances are needed to invoke equitable relief in such a case, we think they are fully supplied by the record, in regard to the time and the manner of the purchase of the material, the diversion of the earnings, and the appointment of the receiver.

The substance of counsels' reply to our contention that these matters were controlled by the bondholders' syndicate is that while the orders came from New York, the witness Markhus did not know who gave them (p. 98). Our answer is that these matters all related to the Company's finances and, as Mr. Fuller, the manager of the syndicate, was the managing director of the Railway Company *as to finances*, there is but one source from whom the order could have come, with authority. It is not likely that the local manager would have purchased the material at the request of a stranger, or some one having no authority, and while the bondholders may have resided, some in Montana and some in New England, the evidence is that they were organized into a syndicate which owned most or all of the bonds, of which syndicate Mr. Fuller was the manager, and himself and Mr. Chas. H. Sabin, of Guaranty Trust Company, and

Mr. John D. Ryan and others were directors (Tr., pp. 130 and 131).

Neither will the rule of decision be changed because some claimants are rich, and some bondholders are poor, nor from the fact that the property did not sell for the amount of the mortgage. If it had, this question would not have arisen, but a part of the value the bondholders did receive was not only the material supplied by claimants, which it is agreed was worth its cost and increased the security to that extent, but in addition to that they received the earnings from which payment was intended.

Regarding the Morris claim, it is true that the "six months contention" does not arise, for it was admitted in the Statement of Facts "the installation thereof (the machinery) was not finally completed or the work accepted until within six months of the appointment of said Markhus as Receiver" (Tr., pp. 67-68). In a case where there was an agreement to pay before delivery or installation, and the claim was not paid, the period of preference would not begin to run until the work and labor of installation had been completed.

(over)

## FINALLY.

*The character of the material.* If it be urged that the material was for construction purposes, can the bondholder complain if the Court decides it was material and supplies necessary to maintenance and operation when the parties to the transaction have so agreed?

*The diversion of the income.* On June 1st, 1913, the Railway Company, which had raised all the money it could, was in this position. It owed these debts for material and supplies for which it had agreed to pay cash. It had on hand sufficient money for this purpose, derived from earnings and intended for such payment, but it could not pay these claims and also the accrued interest on the bonds, and therefore a receivership was inevitable. It had to choose between these obligations and determine which should remain unpaid when the receiver was appointed. The Railway Company was then under the financial direction of the manager of the syndicate owning the bonds, and the bondholder won. Later and a little over six months after the Roebling claim matured, the Railway Company, still under the financial directorate of the syndicate manager, after applying the earnings to the payment of interest, joined in the prayer for the appointment of receiver and "admits that it is "unable to meet and pay its other obligations to its "creditors or to maintain itself as a going concern

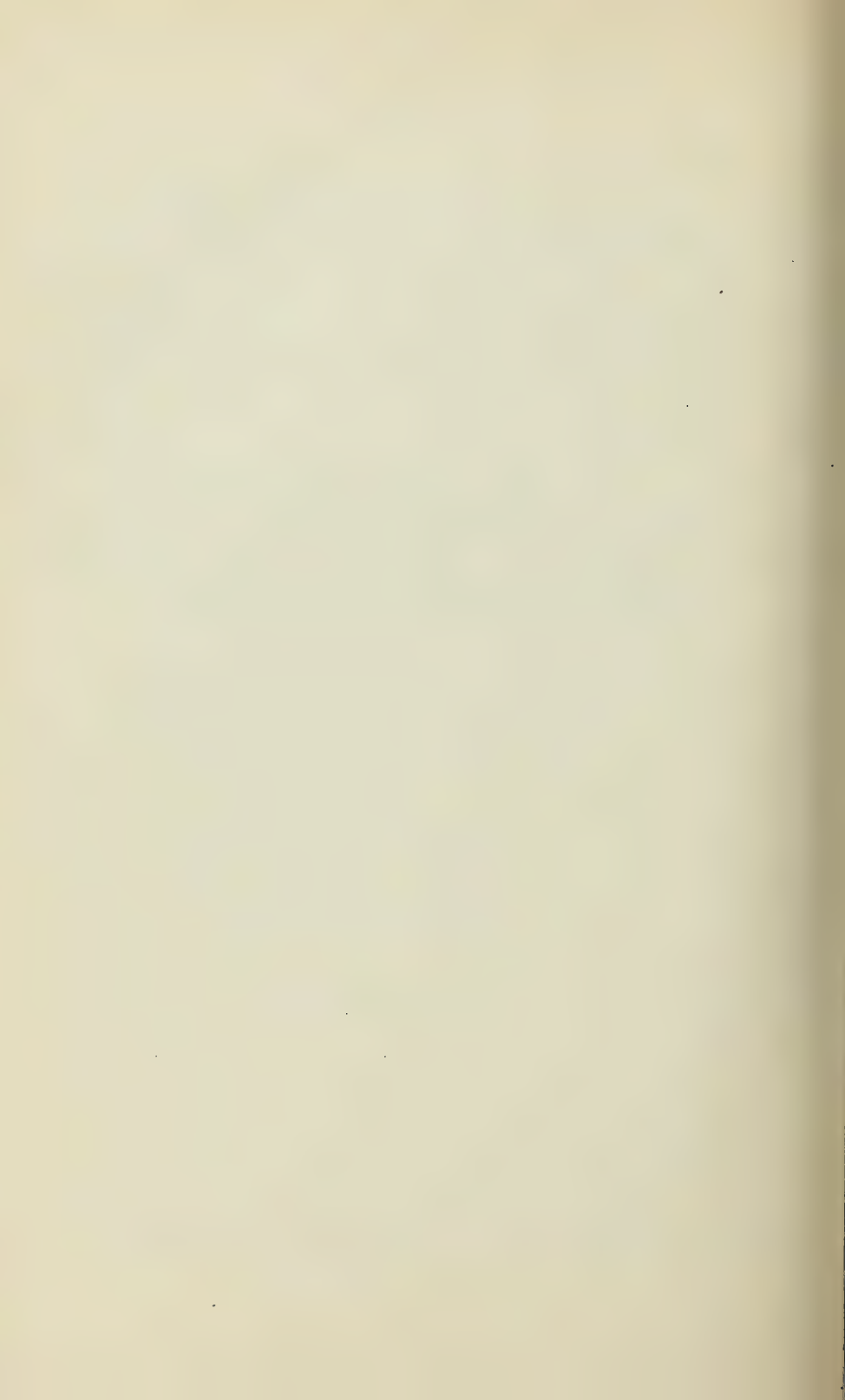
“and that it is necessary that a receiver be appointed  
“to conserve the assets of said defendant and to *pro-*  
“*tect the interests of its creditors and of the public*”  
(Tr., p. 22).

This is the basis of appellants' claims for preference.

Respectfully submitted.

BEVERLY L. HODGHEAD,  
Attorney and Solicitor for John A. Roebling's Sons  
Company of California, a corporation, and  
I. P. Morris Company, a corporation.





No. 2813.

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IN THE  
**United States Circuit Court of Appeals**

FOR THE NINTH CIRCUIT

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JOHN A. ROEBLING'S SONS COMPANY OF CALI-  
FORNIA and I. P. MORRIS COMPANY,  
vs. Appellants,

IDAHO RAILWAY LIGHT & POWER COMPANY, O.  
G. F. MARKHUS, Receiver of said Company, GUAR-  
ANTY TRUST COMPANY, Trustee, ELECTRIC IN-  
VESTMENT COMPANY, AMERICAN STEEL AND  
WIRE COMPANY, GENERAL ELECTRIC COM-  
PANY and WESTINGHOUSE ELECTRIC AND  
MANUFACTURING COMPANY,  
Appellees.

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**PETITION FOR REHEARING.**

---

BEVERLY L. HODGHEAD,  
Attorney and Solicitor for John A. Roebling's Sons  
Company of California, a corporation, and I. P.  
Morris Company, a corporation.

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The James H. Barry Co.  
San Francisco

**Filed**

AUG 13 1917

**F. D. Monckton,**  
Clerk.



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

---

JOHN A. ROEBLING'S SONS COMPANY OF  
CALIFORNIA and I. P. MORRIS COM-  
PANY,

*Appellants,*

vs.

IDAHO RAILWAY LIGHT & POWER COM-  
PANY, O. G. F. MARKHUS, Receiver of  
said Company, GUARANTY TRUST COM-  
PANY, Trustee, ELECTRIC INVESTMENT  
COMPANY, AMERICAN STEEL AND WIRE  
COMPANY, GENERAL ELECTRIC COM-  
PANY and WESTINGHOUSE ELECTRIC  
AND MANUFACTURING COMPANY,

*Appellees.*

No. 2813.

---

PETITION FOR REHEARING.

*To the Honorable Justices of the Circuit Court of  
Appeals of the United States, in and for the Ninth  
Circuit:*

This case is of such vital consequence, not only to  
the parties concerned, but because it involves an  
important principle of law upon which the Honora-



ble Justices of this Court are divided in opinion, that appellants respectfully urge a rehearing.

In this petition, it is not our intention to reargue the entire appeal, but do request the Court to review one or two controlling features which we feel confident will convince the majority of the Court that this case is distinguishable from the rigid line of cases with which it is classified, yet which in fact involved no diversions of income; and especially we ask the Court's attention to the portion of the record showing the part which the bondholders themselves had in the transaction, and which should estop them from denying the equity of appellants' claims of preference.

We will not argue the claim that the so-called "six months rule" is not absolute. The opinion of the majority of the Court admits this point, that is, "that the six months rule is not inflexible" (*Crane vs. Fidelity Trust Co.*, 238 Fed., 693). As pointed out in the briefs of these appellants and in the dissenting opinion of Mr. Justice Gilbert in the *Crane case*, which was adopted by him as the basis of his dissent here, claims older than six months have been allowed so many times by the Supreme Court and by the Circuit Courts of Appeal, including the *Tacoma case* in this Circuit, that we take it that if the majority of the Court were convinced that the other defenses discussed in this case were not tenable, the appeal, owing to the special circumstances which we will

refer to, would not be denied because the claims accrued or were incurred more than six months before the appointment of the receiver.

The special circumstance which would incline the Court to depart from the so-called "six months rule" is the fact which we think can be made entirely clear, that the bondholder himself, and not the Railway Company, directed the purchase of this material from appellants, and that they sold it under the expectation and belief that it was to be paid for from the particular earnings which were diverted to the payment of interest on the bonds.

As stated by Mr. Justice Gilbert, in his dissenting opinion in the case of *Crane vs. Fidelity Trust Co.*, 238 Fed., 699:

"An equitable right of so meritorious a nature should not, we think, be barred by an artificial rule of 6 months limitation, or by a lapse of time (within the statute of limitations) other than a delay which must result in prejudice to the mortgagee."

#### THE PART OF THE BONDHOLDER IN THE TRANSACTION.

The vital feature of these cases which we respectfully urge upon the Court and which was not discussed in the majority opinion is, that the material and supplies for which preference is claimed were in fact purchased from appellants by the agent of the bondholders themselves as managing director of the Railway Company, and that it was sold in the

belief and expectation that the material would be paid for from the very earnings which we are now seeking to have restored and applied, as was intended, for the payment of such material. Mr. Justice Hunt, in the majority opinion, says:

“If there is an outstanding mortgage contract between the corporation and the mortgage creditor such as there was here, preference will not be awarded over the mortgage creditors, unless it is proven that all parties agreed that the claim of the merchant shall be first paid out of current earnings of the buying company.”

The record in this case, we say confidently, meets this requirement, that is, the mortgage creditor himself directed the purchase of the material and allowed the appellants to believe that the earnings which were applied upon the bondholders' interest on June 1, 1913, would be used for the payment of these supplies, which, under the cases cited below, is sufficient for the purpose of such claims.

Let us inquire if these statements are borne out by the record. First, did the bondholder have anything to do with the purchase of the material? Both at the time the material was purchased and delivered, and at the time of the diversion of earnings complained of, Mr. Samuel L. Fuller, the manager of the bondholders' syndicate, was also the active man-

aging director of the Railway Company in respect to its finances. The record shows as follows:

"Mr. Fuller was the head of the syndicate" (Testimony of O. G. F. Markhus, Receiver, Tr., p. 118).

"That syndicate is managed by my firm, as syndicate managers" (Testimony of Samuel L. Fuller, Tr., p. 129).

"Samuel L. Fuller is the vice-president of the Railway Company, and with respect to finances he was in fact its managing director" (Testimony of Receiver Markhus, Tr., p. 118).

"The order (for material) was placed here. I don't recall who instructed me to give the order, *but we got instructions from New York*" (Testimony of Receiver Markhus, Tr., p. 118).

The order on June 1st to divert the earnings of the Railway Company, available for the payment of appellants' claims, to the payment of the interest on the bonds, must also have come from the management which owned the bonds. Stated more clearly, the manager of the bondholding syndicate, who was also the Vice-President and managing director of the Railway Company, himself was responsible for the purchase of the material, which was to be paid for out of the earnings, and almost immediately thereafter diverted the earnings to the payment of the interest on his own bonds.

The Stipulation of Facts recites that the appellants sold the supplies and material in the belief and



in the expectation on their part that the same should be paid for out of current operating income.

The Supreme Court decided in

*Virginia & Alabama Coal Co. vs. Central R. Co.*, 170 U. S., 356,

that it was only necessary as to that matter for it to appear that "it was the expectation of the *creditors* that the indebtedness created would be paid out of the current earnings of the company." See page 368, where it is said:

"The dominant feature of the doctrine, as applied in *Burnham vs. Bowen*, is that where expenditures have been made which were essentially necessary to enable the road to be operated as a continuing business, and *it was the expectation of the creditors that the indebtedness created would be paid out of the current earnings of the company*, a superior equity arises in favor of the material-man as against the mortgage bonds, *in the income arising both before and after the appointment of a receiver from the operation of the property.*"

This language was quoted and approved in the *Carnegie case*, 176 U. S., at p. 285.

In *Moore vs. Donahoo*, 217 Fed., at p. 184, the Court reviewed this question and said:

"So with the unsecured claimant: Such equity as he may have flows from the fact that, in the ordinary course of business, he has performed labor or furnished necessary supplies to the railroad company *with the expectation of being paid therefor from certain funds.*"

In the instance cited by Mr. Justice Hunt in the prevailing opinion, the mortgage creditor had no part in the transaction. Here the mortgage creditor directed the transaction, and we respectfully urge should be held to the terms thereof, instead of being permitted to retain the property and also the earnings intended for payment thereof.

*If it can be shown that there was a diversion of earnings in this case to the payment of interest on the bonds, and that the earnings so diverted were the particular earnings which it was intended and expected should be applied in payment of these claims, and that this purchase was made at the instance of the bondholders themselves, the case certainly presents stronger equitable grounds for preference than the Kneeland and Thomas and Gregg cases referred to in the prevailing opinion in the Crane case, which involved no diversion of income and where the bondholders had no part in the transaction leading to the purchase of the material.*

#### DIVERSION OF INCOME.

Was there any diversion of income for the payment of interest with respect either to the Roebbling or Morris claims? Appellants contend that the earnings which were used to make up the interest payment on June 1, 1913, upon the bonds of the mortgage creditors, were the particular earnings or income which it was intended should be used in payment of these

claims, and it is inequitable to permit for the bondholder through its managing director, who at the same time was managing director of the Railway Company as to finances, to take these earnings and divert them to the payment of his own interest. It is agreed that the material purchased added to the value of the mortgage security, the full amount of the price paid therefor. It is shown by the record and it is stated in opinion of the Court in this case, that of the money used for the payment of interest on the bonds on June 1, 1913, "\$79,000 was obtained from the earnings of the Company during the period mentioned." It is further stated in the opinion of the Court, which is supported by the record and Stipulation of Facts, that this interest reserve was being set up by the Company from the earnings "*during the time when the supplies were furnished,*" that is, as to the Roebling claim between the 18th day of March and the 30th day of May, 1913. The material was sold and was delivered from time to time between those dates, and it was intended, as shown by the Stipulation of Facts, that the sale was to be for cash, within thirty days, and it must therefore have been expected that it was to be paid from the earnings "*during the time when the supplies were furnished.*" We, therefore, respectfully but earnestly take issue with the Court in the statement that "*there was no diversion of any income earned after the accrual of the Roebling Sons Company's claim.*"

But even if this were true, we also contend that the preferential claimant is not limited to the income which has been earned after the claim *accrued*, but is entitled to look to the earnings after the debt was *incurred*. This Court so determined explicitly in the case of

*Moore vs. Donahoo*, 217 Fed., 186,

where it is said that otherwise "generally speaking, "it would inevitably result that claims most recently "accruing, and therefore most clearly entitled to protection, would least often be in a position to demand a restoration of diverted funds." The full decision of the Court on this point is as follows:

"The appellants insist upon the former standard; that is, that there can be no diversion as to any creditor until his claim becomes due. In that view, if we suppose that employes upon monthly salaries, payable upon the 10th day of each succeeding month, render services to a corporation during a given month in expectation that they will be paid out of the current income, which they help to create, and upon the 1st day of the following month such income is applied to the payment of claims for betterments, and thereupon the mortgagee commences a suit in foreclosure and procures the appointment of a receiver, it is clear that the employes are left remediless. Again, under such a rule, what relief is available for those who supply materials or perform labor during the month immediately preceding a receivership, in a case where the current revenues for that month are applied to the satis-



faction of similar claims accruing during the preceding month, which have remained unpaid because of the diversion of the current revenues for that month to the discharge of interest on bonds? And, generally speaking, it would inevitably result that *claims most recently accruing*, and therefore most clearly entitled to protection, would least often be in a position to demand a restoration of diverted funds. It is doubtless true in actual practice that credit is extended for current supplies and for labor upon the assumption that there has been no improvident diversion of the current income in the immediate past quite as often as upon the expectation that there will be no such diversion in the immediate future."

The above rule applies similarly to the claim of appellant, the I. P. Morris Company. The debt in that case had not become due when the interest was paid on June 1st, but it has been *incurred* and the Railway Company had received the material. The earnings used for the payment of interest were derived "*during the time the material was being supplied*," and after the debt was incurred. The current supply creditor therefore, under the rule of the cases above cited, was entitled to look to these earnings for the payment of its claim.

In the Morris case the material was delivered to the Railway "in the spring of 1913," and the first unit was installed and placed in operation about June 1st (Tr., p. 69).

## THE CHARACTER OF THE MATERIAL.

We earnestly contend that in view of the extensive system of railway and electric properties operated by the defendant company, the material and supplies furnished under the circumstances above related, were properly chargeable to maintenance and operation, and that this claim is within the rule of the case of

*Southern Railway vs. Carnegie Steel Co.*, 176 U. S., 258.

In the *Carnegie case* and the *Lackawanna case*, 176 U. S., p. 298, decided the same day by the Supreme Court, the character of the material was the same. In each case the material was for steel rails. The difference was in the quantity. In the *Lackawanna case* the claim of preference was *denied* on the ground that the quantity was so large that, relatively speaking, it amounted to reconstruction. In the *Carnegie case*, the claim was for the price of 2500 tons of steel rails and preference was *allowed* because "the quantity was not so large as to preclude the expectation that they could be paid for out of the current earnings of the railroad" (176 U. S., 290). The question is a relative one. The test seems to be, as stated in the *Carnegie case*, *whether it may reasonably be expected that payment is to be made from current earnings*. In this appeal, it is admitted in both Stipulations of Fact that it was the expectation

of the creditors that the indebtedness be paid from the current earnings. It was reasonable for them to expect such payment because the record shows that the earnings were sufficient for that purpose, and the amount of the claim was insignificant when compared with the system of properties owned and operated by the Railway Company. The material was supplied to meet the actual needs of the corporation, and we think it but just, when comparing the amount of the material furnished, to consider the Railway Company's entire system instead of segregating it into separate parts which might make the quantity furnished, relatively considered, so large as to amount to construction instead of maintenance and operation. The admitted facts justify us in contending that the entire system of railway and electrical properties should be considered in connection with this claim instead of its component parts, because of the admission, at least in the *Morris case*, "that the machinery is necessary to the continued operation of the Railway Company's system" (Tr., p. 72), and further, that the properties of the Railway Company were an *indivisible system*, and the power and railway properties used in connection with each other (Tr., pages 99-100).

It is said by the Court in the prevailing opinion in the *Crane case* (238 Fed., 697) in referring to the case of *Miltonsberger vs. Logansport* and other cases, that they were decided fifteen years before the be-

ginning of the series of decisions found in the *Kneeland* and *Thomas* cases and others, but we respectfully draw the attention of the Court to the fact that later than the *Kneeland* and *Thomas* cases is the *Carnegie* case, 176 U. S., 257, and concerning those cases the Court said:

“In neither the *Kneeland* nor the *Thomas* case *was there any intention to question the prior decisions of the Court*, which allowed priority to claims based upon the furnishing of essential and necessary current supplies, not sold upon mere personal credit, against the surplus income arising during the operation of the road under the direction of a court of equity.”

The case which seems peculiarly analogous to the one under discussion, because it deals with the part which the bondholder had in the transaction, is the case of

*Union Trust Co. vs. Souther*, 107 U. S., 591.

The Court was dealing with the income after the appointment of a receiver, but we take it there is no essential difference in the rules defining material used for construction, and material and supplies used for maintenance and operation before and after the appointment of the receiver. The point in the case of *Union Trust Co. vs. Souther* was that material and supplies added to the value of the property, afterwards sold, and would have been chargeable to construction, but because of the fact that the expenditure



was made at the request of the bondholders, the Court held that the supply creditors were entitled to restoration of the funds. In this connection the Court said:

"The income of the receivership, instead of being applied in accordance with the order to pay the debts for the supplies and labor, was used, *with the consent, and it may fairly be inferred, at the request of the bondholders*, to buy additional grounds, rolling stock, etc., and to make permanent improvements, thus adding to the value of the property; which was afterwards sold. There is nothing whatever to indicate that in thus using the income it was the intention of the Court to revoke the original order. It seems to have been found, in the administration of the cause, that by using the income to add to the value of the fixed property the interests of all parties would be promoted, and so the fund, which in equity belonged to the labor and supply creditors, was for the time being diverted from them and put into improvements and additions, the proceeds of which are now in court. It is not to be presumed that this diversion would have been authorized if the value of the property added to and improved was not to be correspondingly increased. *Clearly, therefore, on the face of the transaction, the fund in court represents in equity the income which belongs to the labor and supply creditors as well as the mortgage security, and there was no impropriety in appropriating it as far as necessary to pay the creditors specially provided for when the receiver was appointed. Such a practice, under proper circumstances, was approved in Fosdick vs. Schall, ubi supra, and seems to us eminently just.*"

*We respectfully urge that inasmuch as this material was sold for cash and in the expectation that it was to be paid for from the earnings and that the particular earnings which must have been intended for its payment were diverted to the payment of the interest on the bonds, and that the bondholder directed the transaction and also controlled the diversion and received the benefit of the interest and also of appellants' property, it is inequitable to deny this claim. Appellants therefore respectfully petition for a rehearing.*

Respectfully submitted.

BEVERLY L. HODGHEAD,

Attorney and Solicitor for John A. Roebling's Sons Company of California, a corporation, and I. P. Morris Company, a corporation.

I hereby certify that the foregoing petition for rehearing is not filed for delay and in my opinion is well founded in point of law.

BEVERLY L. HODGHEAD,

Attorney and Solicitor for John A. Roebling's Sons Company of California, a corporation, and I. P. Morris Company, a corporation.



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

E. SCHOENWALD and S. T. HILLS as Receivers  
and Assignees of the PACIFIC COAST &  
NORWAY PACKING COMPANY, a Cor-  
poration,

Plaintiffs in Error,

vs.

HARRY A. BISHOP, as United States Marshal  
for the First Division of the District of  
Alaska, and D. N. McDONALD,

Defendants in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court of the  
District of Alaska, Division No. 1.

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Filed

F. D. Mudgett  
Clerk





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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E. SCHOENWALD and S. T. HILLS as Receivers  
and Assignees of the PACIFIC COAST &  
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District of Alaska, Division No. 1.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

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Attorneys for Plaintiffs in Error.

GUNNISON & ROBERTSON, Juneau, Alaska,

Attorneys for Defendants in Error.

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*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS and E.  
SCHOENWALD and S. T. HILLS, as Re-  
ceivers and Assignees of the PACIFIC  
COAST & NORWAY PACKING COM-  
PANY, a Corporation,

Plaintiffs,

vs.

HARRY A. BISHOP, as United States Marshal for  
the District of Alaska, Division Number One,  
and D. N. McDONALD,

Defendants.

**Complaint.**

Plaintiffs complain and allege:

**I.**

That on, to wit, the 16th day of September, A. D. 1914, E. Schoenwald, one of the above-named plaintiffs, was duly and regularly appointed receiver of the Pacific Coast & Norway Packing Company, a Corporation organized under the laws of the State



of Minnesota and doing business in the Territory of Alaska, by the Superior Court of King County, State of Washington, a court of competent jurisdiction, in the case of Roy W. Niven vs. Pacific Coast & Norway Packing Company, a corporation, in cause No. 103,-639 of said King County Superior Court. That immediately thereafter and on, to wit, said 16th day of September A. D. 1914, the said E. Schoenwald filed his bond as such receiver, which was duly and regularly approved and he duly and regularly qualified and became the acting receiver of [1\*] the said Pacific Coast & Norway Packing Company, and has ever since and is now one of the receivers of said company.

## II.

That thereafter and on, to wit, the 25th day of September, A. D. 1914, S. T. Hills, one of the above-named plaintiffs was also appointed coreceiver, by the said Superior Court of King County, State of Washington, in said case of Roy W. Niven vs. Pacific Coast & Norway Packing Company aforesaid, to act as advisory receiver with the said E. Schoenwald. That immediately thereafter and on, to wit, the — day of September, A. D. 1914 the said S. T. Hills filed his bond as such coreceiver, which was duly and regularly approved, and he duly and regularly qualified as such coreceiver and has ever since and now is one of the receivers of the said Pacific Coast & Norway Packing Company.

## III.

That the respective appointments of said plaintiffs

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\*Page-number appearing at foot of page of original certified Record.

as receivers of said Pacific Coast & Norway Packing Company was voluntary on the part of the said Pacific Coast & Norway Packing Company and at the suggestion and with the acquiescence, assistance and consent of said company and was done solely for the purpose of preserving and keeping intact the property and assets of said company and preventing forced sales thereof by reason of certain suits which had been brought against said company shortly prior to the time of such appointment of said receivers, and in order to prevent dissipation of the assets of said company by reason of such forced sales of the property of said company under execution, or otherwise, and for the [2] purpose of protecting the creditors of said company; that at the time of the appointment of said plaintiffs as receivers as aforesaid the assets of said Pacific Coast & Norway Packing Company exceeded the liabilities against said company and the appointment of the plaintiffs as receivers was for the purpose of protecting and preserving the assets of said company so that the creditors of said company could have their claims against said company paid in full.

#### IV.

That on, to wit, the 26th day of October, A. D. 1914, the said Pacific Coast & Norway Packing Company voluntarily and of its own free will and accord and for the benefit of all the creditors of said company, by good and sufficient deed of conveyance, conveyed all of its property, both real and personal, situate in the Territory of Alaska, unto the said plaintiff, E. Schoenwald and S. T. Hills, as receivers and as-

signees of said company, as aforesaid, for the benefit of all the creditors of said company. That said deed of conveyance included and conveyed the power seine boat "Bernice," owned by the said Pacific Coast & Norway Packing Company and hereinafter referred to and mentioned; that said deed of conveyance was within a few days thereafter filed for record and recorded in the office of the United States Recorder of the Wrangell Precinct, at Wrangell, Alaska, that being the precinct within which said property of said company was situate.

V.

That the defendant, McDonald, was advised and well knew of the appointment of said plaintiffs as receivers as hereinbefore set forth, and well knew and had [3] full notice that the Pacific Coast & Norway Packing Company had conveyed all of its property, both real and personal, including said power seine boat "Bernice" unto said plaintiffs herein as receivers and assignees of said corporation, for the benefit of its creditors, and said defendant well knew and was informed that the appointment of said receivers and the conveyance of the property by said company to said receivers as assignees were voluntary and made and done for the purpose of protecting and preserving the assets of said Pacific Coast & Norway Packing Company for the benefit of its creditors, including the said McDonald, and that said assets, if properly preserved and protected, exceeded the liabilities of said corporation; that said defendant, McDonald, with full knowledge and notice, both actual and constructive, consented to and acquiesced

in the said deed of conveyance, conveying the property of said Pacific Coast & Norway Packing Company, including said power seine boat "Bernice," to said receivers and assignees.

VI.

That immediately after the appointment of E. Schoenwald, one of the plaintiffs herein, as receiver as aforesaid, the said Schoenwald, as such receiver, took possession of said power seine boat "Bernice" and at the time of the conveyance of said power seine boat "Bernice" and other property by said Pacific Coast & Norway Packing Company to said Schoenwald and Hills, as receivers, as hereinbefore fully set forth, the said power seine boat "Bernice" was then in the actual possession of said receivers who were using and operating the same in the conduct of the business being carried on by them as such receivers of said Pacific Coast & Norway Packing Company and at the time of the attachment made by the defendant herein, as hereinafter more fully set [4] forth and described, the said Schoenwald and Hills as such receivers and assignees had the title to such power seine boat "Bernice" under the said deed from said Pacific Coast & Norway Packing Company conveying said boat to them, and had at said time, and for some time prior thereto, possession of said power seine boat "Bernice." That said deed of conveyance from said Pacific Coast & Norway Packing Company conveying said boat "Bernice" to said receivers as aforesaid was long prior to the attachment of said boat "Bernice" by the defendant, hereinafter referred to and described.



## VII.

That several months after the conveyance of said power seine boat "Bernice" by said Pacific Coast & Norway Packing Company unto the said Schoenwald and Hills, receivers and assignees as aforesaid, and long after the appointment of said Schoenwald and Hills as receivers of the Pacific Coast & Norway Packing Company, the defendant, D. N. McDonald, brought an action against said Pacific Coast & Norway Packing Company, being cause No. 1137-A of this court, to recover judgment upon two certain promissory notes in the complaint in said action set out and described, and in connection with said cause No. 1137-A, and on, to wit, the — day of January, A. D. 1915, sued out and placed in the hands of the United States Marshal writ of attachment, and Harry A. Bishop, United States Marshal for the District of Alaska, Division Number One, one of the above-named defendants, wrongfully attached under said writ and made levy upon the power seine boat "Bernice," at Petersberg, Alaska; and without the plaintiffs' consent the said defendant, Harry A. Bishop, at Petersburg, Alaska, wrongfully and unlawfully took the power seine boat "Bernice" from the possession of the plaintiffs. That as hereinbefore alleged, at the time of such attachment and levy and [5] for a long time prior thereto the title, possession and right of possession to said power seine boat "Bernice" was in the plaintiffs as such receivers and assignees as aforesaid, and such title is now and has been ever since the said 25th day of October, A. D. 1914, and long prior to the attachment and levy

aforesaid in the plaintiffs as receivers and assignees as aforesaid.

### VIII.

That before the commencement of this action, to wit, on the 24th day of April, A. D. 1915, and on several occasions prior and subsequent thereto, the plaintiffs demanded of the defendants possession of said power seine boat "Bernice"; that said defendants still wrongfully and unlawfully withhold and detain said power seine boat "Bernice" within the first judicial division of Alaska from the possession of the plaintiff to their damage in the sum of \$500, that being the reasonable worth and value of the use of said boat "Bernice" during said time that plaintiffs have been deprived thereof.

### IX.

That the defendant under the attachment hereinbefore described will have execution issued and the said power seine boat sold to satisfy the claim or judgment of the defendant, D. N. McDonald, against the Pacific Coast & Norway Packing Company in said cause No. 1137-A of this court as aforesaid, unless redelivery of said power seine boat "Bernice" is made to the plaintiffs; that said defendants wrongfully and unlawfully withhold and detain said power seine boat from the possession of the plaintiffs.

### X.

That said power seine boat "Bernice" is of the value of approximately \$2,000; that the plaintiffs have [6] demanded of the defendant possession of said boat, but the defendants refuse to redeliver the same to the plaintiffs, and defendants still wrongfully

and unlawfully detain the same from the possession of the plaintiffs.

## XI.

That said power seine boat "Bernice" has not been taken for a tax assessment or fine pursuant to a statute or seized under an execution or attachment against the property of the plaintiffs.

WHEREFORE the plaintiffs demand judgment against the defendants,—

FIRST. For the recovery of the possession of said power seine boat "Bernice," or for the value thereof in case a delivery cannot be made.

SECOND. For \$500 damages and the costs of suit.

WINN & BURTON,  
Attorneys for Plaintiffs.

United States of America,  
Territory of Alaska,—ss.

E. Schoenwald, being first duly sworn, on oath deposes and says: I am one of the plaintiffs in the above-entitled cause; I have read the foregoing complaint, know the contents thereof and believe the same to be true.

E. SCHOENWALD.

Subscribed and sworn to before me this 28th day of April, A. D. 1915.

[Notarial Seal] NEWARK L. BURTON,  
Notary Public for Alaska.

My commission expires November 8, 1917.

Filed in the District Court, District of Alaska,  
First Division. Apr. 28, 1915. J. W. Bell, Clerk.  
By —————, Deputy.

[Endorsed]: In the District Court for the Territory of Alaska, Division No. 1. E. Schoenwald and S. T. Hills and E. Schoenwald and S. T. Hills, as Receivers and Assignees of the Pacific Coast & Norway Packing Company, a Corporation, Plaintiff, vs. Harry A. Bishop, as United States Marshal for the District of Alaska, Division Number One, and D. N. McDonald, Defendants. Complaint. Winn & Burton, Attorneys for Plaintiffs, Juneau, Alaska. [7]

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*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS and E.  
SCHOENWALD and S. T. HILLS, as Re-  
ceivers and Assignees of the PACIFIC  
COAST & NORWAY PACKING COM-  
PANY, a Corporation,

Plaintiffs,

vs.

HARRY A. BISHOP, as United States Marshal for  
the District of Alaska, Division Number One,  
and D. N. McDONALD,

Defendants.

**Answer.**

COME NOW the defendants herein and, for answer to Plaintiff's Complaint, allege, admit and deny as follows, to wit:

I.

Answering paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI of said Complaint, defendants deny



each and every allegation contained in said paragraphs, and in each of them, save and except as hereinafter specifically admitted; and save and except the allegation as to the value of the boat "Bernice" as set forth in paragraph X of the complaint.

AND AS A FURTHER SEPARATE AND FIRST AFFIRMATIVE DEFENSE, the defendants allege:

I.

That on the 25th day of January, 1915, D. N. McDonald, one of the defendants herein, duly commenced an action in the above-entitled court against the Pacific Coast & Norway Packing Company, a corporation, which action is Number 1217-A of the records and files of this court, for the recovery of judgment on two promissory notes, the principal of which aggregated [8] \$1,404.89, together with interest thereon, and attorneys' fees and costs of said suit; that the transactions out of which said action arose all occurred in the Territory of Alaska; and that at the time of the commencement of said suit, and of the accruing of the cause of action therein sued on, and for many years prior thereto, and at all times since, the said McDonald has been, and is now, a resident and citizen of the Territory of Alaska, residing in the first judicial division thereof.

II.

That on the said date a summons in due form was issued in said cause No. 1217-A, and thereafter and on said day said McDonald duly filed therein his affidavit and undertaking for attachment; and thereupon and on said day the clerk of this court, under the

seal thereof, duly issued a writ of attachment in said action, directing the defendant Harry A. Bishop as United States Marshal for the first division of said Territory of Alaska, to attach and safely keep sufficient property of said Pacific Coast & Norway Packing Company which could be found in said Territory to cover said demand so made by said defendant McDonald against said company; and that thereafter said summons and said writ of attachment were duly placed in the hands of said defendant Bishop, as such United States Marshal, for service; and that thereafter, and on February 4, 1915, said summons was by him, as such Marshal, duly served on said Pacific Coast & Norway Packing Company at Petersburg, Alaska, by delivering to its duly appointed statutory and managing agent a true copy thereof, to which was attached a copy of the complaint therein; and that thereafter, and on February 4, 1915, said writ of attachment was by him, as such Marshal, duly served on said Pacific Coast & Norway Packing Company at Petersburg, Alaska, by delivering to its duly appointed statutory and managing agent a true copy of said writ, and thereafter and on February 4, 1915, due levy was made by him, as such Marshal, upon the gasoline vessel "Bernice," her engine, machinery, tackle, equipment and furniture, by taking [9] said vessel, her engine, machinery, tackle, equipment and furniture into his possession and custody, and placing a keeper in charge thereof, at Petersburg, Alaska, under and by virtue of said writ; that said vessel at the time of the making and levy of said attachment, and at all times since prior to September

1, 1914, had been and is now an American licensed vessel of over the burden of five net tons, to wit, eleven net tons, and was at the time of the making and levy of said attachment, and at all times since prior to September 1, 1914, up to and until a long time subsequent to said levy was documented and licensed in the United States Customs District of Alaska.

### III.

That thereafter, and on April 20, 1915, a trial was duly had in said cause No. 1217-A, and thereafter and on April 28, 1915, judgment was duly made, rendered, and entered in said action in the above-entitled court, against said Pacific Coast & Norway Packing Company, a corporation, and in favor of said D. N. McDonald for the sums of \$702.44, with interest at seven per cent per annum from October 26, 1914, and \$702.45, with interest at seven per cent per annum from November 25, 1914, and for \$300 as attorneys' fees, and for his costs and disbursements in said action to be taxed by the clerk; and that said judgment further ordered and adjudged that said gasoline vessel be sold by said defendant Bishop, as such Marshal, to satisfy the demands of said defendant McDonald obtained in said cause No. 1217-A as above stated.

### IV.

That at the time of the rendering, making and entering of said judgment in said cause No. 1217-A, said defendant Bishop, as such Marshal, was in the possession and custody of said gasoline vessel, her engine, machinery, tackle, equipment and furniture, under and by virtue of said writ of attachment, and

he continued, and at all times thereafter was, under and by virtue of said writ and of said judgment in the possession and custody thereof, up to and until three days [10] after the commencement of this suit, at which time he, as such Marshal, delivered and surrendered the possession of said vessel, her engine, machinery, tackle, equipment and furniture, to plaintiffs herein under a bond given in this suit for that purpose; and that it was, and is now, the intention of the defendant McDonald to cause an execution to be issued out of this court and due levy made thereof for the sale of said gasoline vessel to satisfy his demands rendered to judgment so obtained in said cause No. 1217-A.

V.

That at the time of the commencement of said cause No. 1217-A, and at the time of the levying of said writ of attachment in said cause, and for a long time prior to both of said occasions, and at all times since prior to September 1, 1914, and at the present time, said gasoline vessel "Bernice," her engine, tackle, machinery, equipment and furniture, was, has been and is the property of the Pacific Coast & Norway Packing Company, a corporation, and does now so remain its property, and at all of said times the said vessel, her engine, tackle, machinery, equipment and furniture, was subject to attachment and execution as the property of said company in said cause No. 1217-A, and at all of said times and since prior to September 1, 1914, the said vessel, was, and is now, in the Territory of Alaska, and within the jurisdiction of this court.



## VI.

That the plaintiffs are, and each of them is, threatening and attempting to wrongfully and unlawfully prevent, hinder, delay and defraud the said defendant McDonald in the satisfaction of his demands and claim against the said Pacific Coast & Norway Packing Company so obtained and reduced to judgment in said cause No. 1217-A and to wrongfully and unlawfully withdraw and remove said gasoline vessel from the control and jurisdiction of this court in order to accomplish said purpose; and that the said plaintiff's will, as defendant McDonald fears, unless restrained by this Honorable Court, carry out and perform their said wrongful and unlawful threats, attempts [11] and acts; and that, if said plaintiffs be permitted so to do, the defendant McDonald will be irreparably injured, prejudiced and damaged in that he will not be able to obtain satisfaction of his just demand against said company in the Territory of Alaska, whereof he is, and has been for many years, a citizen and resident; and which said demand was reduced to judgment as aforesaid in cause No. 1217-A of this court.

AND AS A FURTHER, SEPARATE AND SECOND AFFIRMATIVE DEFENSE, defendants allege:

## I.

That the plaintiffs are not the real parties, and neither of the plaintiffs is, the real party, in interest in this action;

AND AS A FURTHER, SEPARATE AND THIRD AFFIRMATIVE DEFENSE, defendants allege:

I.

That this Honorable Court has no jurisdiction of the alleged cause of action set forth in plaintiffs' complaint, and has no jurisdiction over the defendants, or either of them;

AND AS A FURTHER, SEPARATE AND FOURTH AFFIRMATIVE DEFENSE, defendants allege:

I.

That plaintiffs have no right, and neither of them has any right, to bring this action in the courts of the territory or of the district of Alaska, and that said plaintiffs are, and each of them is, without legal capacity to prosecute said suit in the courts of the territory or of the district of Alaska.

WHEREFORE, defendants pray that they go hence without day, and that plaintiffs take nothing by this action; and that the plaintiffs return and restore, and make restitution of, said gasoline vessel, her engine, machinery, tackle, furniture and [12] equipment, to the defendant Harry A. Bishop, as such United States Marshal; and that the plaintiffs, and each of them, be permanently restrained and enjoined from withdrawing or removing said vessel from the jurisdiction of this court; and that defendants have their costs and disbursements herein incurred; and for such other and further relief as may be just and proper in the premises.

GUNNISON & ROBERTSON,  
Attorneys for Defendants.

United States of America,  
Territory of Alaska,  
Divison Number One,—ss.

D. N. McDonald, being first duly sworn, on oath deposes and says: That he is one of the defendants in the foregoing entitled action; that his codefendant, Harry A. Bishop, is now absent from and without the District of Alaska; that he has read the foregoing Answer, and knows the contents thereof, and that the same are true as he verily believes.

D. N. McDONALD.

Subscribed and sworn to before me this 26th day of June, 1915.

My commission expires June 19, 1917.

[Notarial Seal] R. E. ROBERTSON,  
Notary Public in and for the Territory of Alaska.

Receipt of copy and due service of the within Answer admitted this 28 day of June, 1915.

WINN & BURTON,  
Attorneys for Plaintiff.

Filed in the District Court, District of Alaska,  
First Division. Jun. 28, 1915. J. W. Bell, Clerk.  
By ————, Deputy.

[Endorsed]: No. 1264—A. In the District Court for the Territory of Alaska, Division No. 1. E. Schoenwald and S. T. Hills and E. Schoenwald and S. T. Hills as Receivers and Assignees of the Pacific Coast & Norway Packing Company, Plaintiffs, vs. Harry A. Bishop and D. N. McDonald, Defendants.

Answer. Gunnison & Robertson, Attorneys for Defendants, 101-105 Decker Building, Juneau, Alaska. [13]

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*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS and E.  
SCHOENWALD and S. T. HILLS, as Re-  
ceivers and Assignees of the PACIFIC  
COAST & NORWAY PACKING COM-  
PANY, a Corporation,

Plaintiffs,

vs.

HARRY A. BISHOP, as United States Marshal for  
the District of Alaska, Division Number One,  
and D. N. McDONALD,

Defendants.

**Motion to Strike Portions of Answer.**

Come now the above-named plaintiffs by their attorneys, Winn & Burton, and move the Court to strike from the Answer filed in said above-entitled cause all of the second, third and fourth affirmative defenses in said Answer contained for the following reason and upon the following grounds, to wit, namely:

I.

That said above-named affirmative defenses allege and raise issues of conclusions of law and can only be reached by demurrer.



## II.

That each and all of said above-named affirmative defenses have been presented by the defendants by written motions and demurrer filed in said above-entitled cause and argued before the above-entitled court, and have been fully passed upon and adjudicated by the above-entitled Court, and the defendants compelled to answer the allegations of the complaint.

Reference is made to the records and files in said above-entitled cause in support of the foregoing motion.

WINN & BURTON,  
Attorneys for Plaintiffs.

Received copy of foregoing motion this 7th day of July, A. D. 1915.

GUNNISON & ROBERTSON,  
Attorneys for Defendants.

Filed in the District Court, District of Alaska, First Division. Jul. 7, 1915. J. W. Bell, Clerk.  
By ———, Deputy.

[Endorsed]: No. 1264-A. In the District Court for the Territory of Alaska, Division No. 1. E. Schoenwald and S. T. Hills et al., Plaintiffs, vs. Harry A. Bishop and D. N. McDonald, Defendants. Motion. Winn & Burton, Attorneys for Plaintiffs, Juneau, Alaska. [14]

*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS, and E.  
SCHOENWALD and S. T. HILLS, as Re-  
ceivers and Assignees of the PACIFIC  
COAST & NORWAY PACKING COM-  
PANY, a Corporation,

Plaintiffs,

vs.

HARRY A. BISHOP, as United States Marshal for  
the District of Alaska, Division Number One,  
and D. N. McDONALD,

Defendants.

**Demurrer.**

Come now the plaintiffs herein by their attorneys,  
Winn & Burton, and demur to the first affirmative  
defense contained in the Answer herein, for the fol-  
lowing reason and upon the following ground, to wit,  
namely:

I.

That said further, separate and first affirmative  
defense contained in said Answer does not state facts  
sufficient to constitute a defense to the matters and  
things set forth in the Complaint filed in said above-  
entitled cause.

WINN & BURTON,  
Attorneys for Plaintiffs.

Received copy of foregoing Demurrer this 7th day of July, A. D. 1915.

GUNNISON & ROBERTSON,  
Attorneys for Defendants.

Filed in the District Court, District of Alaska, First Division. Jul. 7, 1915. J. W. Bell, Clerk. By —————, Deputy.

[Endorsed]: No. 1264-A. In the District Court for the Territory of Alaska, Division No. 1. E. Schoenwald and S. T. Hills et al., Plaintiffs, vs. Harry A. Bishop and D. N. McDonald, Defendants. Demurrer. Winn & Burton, Attorneys for Plaintiffs, Juneau, Alaska. [15]

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*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS, and E.  
SCHOENWALD and S. T. HILLS, as Re-  
ceivers and Assignees of the PACIFIC  
COAST & NORWAY PACKING COM-  
PANY, a Corporation,

Plaintiffs,

vs.

HARRY A. BISHOP, as United States Marshal for  
the District of Alaska, Division Number One,  
and D. N. McDONALD,

Defendants.

**Order Overruling Motion to Strike Portions of  
Answer.**

Now, on this day this matter coming on in court on motion of the defendants for the correction of the Journal of this court containing the minutes of the transactions had on the plaintiff's motion to strike the second, third and fourth affirmative defenses of the defendants herein, and the plaintiffs being present in court by their attorneys, Messrs. Winn & Burton, and the Court being fully advised in the premises.

IT IS HEREBY ORDERED, That said motion to strike the second, third and fourth affirmative defenses of the defendants' answer be, and the same is hereby, overruled.

Done in open court this 20th day of December, 1915.

ROBERT W. JENNINGS,  
Judge of the District Court.

Entered Court Journal No. L, page 256.

Filed in the District Court, District of Alaska,  
First Division. Dec. 20, 1915. J. W. Bell, Clerk.  
By —————, Deputy.

[Endorsed]: No. 1264-A. In the District Court for the Territory of Alaska, Division No. 1. E. Schoenwald and S. T. Hills and E. Schoenwald and S. T. Hills as Receivers and Assignees of the Pacific Coast & Norway Pkg. Co., a Corporation, Plaintiffs, vs. Harry A. Bishop, as United States Marshal for the District of Alaska, Division Number One, and D. N. McDonald, Defendants. Order. Gunnison &



Robertson, Attorneys for Defendants, 101-105 Decker Building, Juneau, Alaska. [16]

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*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS, and E.  
SCHOENWALD and S. T. HILLS, as Re-  
ceivers and Assignees of the PACIFIC  
COAST & NORWAY PACKING COM-  
PANY, a Corporation,

Plaintiffs,

vs.

HARRY A. BISHOP, as United States Marshal for  
the District of Alaska, Division Number One,  
and D. N. McDONALD,

Defendants.

**Reply.**

Come now the above-named plaintiffs by their attorneys, Winn & Burton, and for Reply to the defendants' Answer herein, allege, admit and deny as follows:

Replying to the first affirmative defense, plaintiffs allege, admit and deny as follows:

I.

Replying to paragraph I of the first affirmative defense contained in said Answer, plaintiffs have not sufficient knowledge or information upon which to base a belief as to whether or not D. N. McDonald, one of the above-named defendants herein was at the time of the commencement of cause No. 1217-A de-

scribed in said paragraph I of the first affirmative defense, and of the accruing of a cause of action therein sued on, and for many years prior thereto, and at all times since, and is now a resident and citizen of the Territory of Alaska, residing in the First Judicial Division thereof, and therefore deny the same.

## II.

Replying to paragraph V of the first affirmative defense contained in said Answer, plaintiffs admit that the [17] gasoline boat "Bernice," at the time of the commencement of cause No. 1217-A referred to in said paragraph V of defendants' Answer herein, and at the time the attachment and levy in said cause 1217-A, was in the Territory of Alaska and within the jurisdiction of this court, but as to whether or not said gasoline boat, "Bernice," was, prior to September 1, 1914, or at any time prior to the appointment of plaintiffs as receivers on the 16th day of September, 1914, within the Territory of Alaska and within the jurisdiction of this court, plaintiffs have not sufficient information or knowledge upon which to base a belief and therefore deny the same; deny each and every other allegation of said paragraph V of said first affirmative defense in said Answer contained.

## III.

Replying to paragraph VI of the first affirmative defense in said Answer contained, plaintiffs deny each and every allegation therein contained.

And replying to paragraph I of the second affirmative defense contained in said Answer of the above-named defendants, plaintiffs deny as follows:

## I.

Deny each and every allegation in said paragraph I of said second affirmative defense in said Answer contained.

WINTON & BURTON,  
Attorneys for Plaintiffs. [18]

United States of America,  
Territory of Alaska.

Newark L. Burton, being first duly sworn, on oath deposes and says: That I am *one the* attorneys in the above-entitled cause; that I have read over the reply, know the contents thereof, and that I verily believe the same is true; that affiant makes this affidavit for the reason that the plaintiffs are nonresidents of Alaska, and so far as affiant knows are not now within said Territory.

NEWARK L. BURTON.

Subscribed and sworn to before me this 2d day of August, 1915.

[Notarial Seal]

ROSE A. STODDARD,  
Notary Public for Alaska.

My commission expires Feb. 25, 1918.

Service of foregoing is admitted this 2d Aug., A. D. 1915.

GUNNISON & ROBERTSON,  
Attorneys for Defts.

Filed in the District Court, District of Alaska, First Division, Aug. 2, 1915. J. W. Bell, Clerk, By \_\_\_\_\_, Deputy.

[Endorsed]: No. 1264-A. In the District Court for the Territory of Alaska. Division No. 1. E.

Schoenwald et al., Plaintiffs, vs. Harry A. Bishop, et al., Defendants. Reply. Winn & Burton, Attorneys for Plaintiffs, Juneau, Alaska. [19]

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*In the District Court for the District of Alaska,  
Division No. 1 at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS, et al.

vs.

HARRY A. BISHOP, etc., et al.

**Minutes of Court—December 22, 1915.**

**CONTINUATION OF TRIAL.**

Now at this time the trial of this case is resumed before the Court and jury with appearances as of yesterday. The jury are present, and each juror answers to the calling of his name.

Thereupon the motion of the defendants for a non-suit is denied, and the defendants offering no testimony, rest their case. After defendants and plaintiffs move for directed verdicts, counsel for both sides being willing and consenting thereto, the jury herein are discharged, and the case is submitted to the Judge, and continued for further arguments to Monday, December 27, 1915.

Wednesday, December 22, 1915.

ROBERT W. JENNINGS,  
District Judge. [20]



*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS and E.  
SCHOENWALD and S. T. HILLS, as Re-  
ceivers and Assignees of the Pacific Coast &  
NORWAY PACKING COMPANY, a Cor-  
poration,

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Plaintiffs,

W&B

vs.

HARRY A. BISHOP, as United States Marshal for  
the First Division of the District of Alaska,  
and D. N. McDONALD,

Defendants.

### **Judgment.**

This case came on for hearing on the 20th day of December, 1915; the parties being represented by their respective counsel and announcing ready for trial; thereupon trial was duly had on the complaint, answer and reply; and the plaintiffs, having introduced evidence in their behalf, rested; and the defendants introducing no evidence thereupon rested; whereupon it was agreed in open court and entered of record that the jury theretofore empanelled in the cause might be discharged and the matter submitted to the Court for decision on the pleadings and the evidence; and the jury having thereupon been discharged, both sides moved for judgment; and thereafter, argument by respective counsel having been had, the Court took the matter under advisement and on the 3d day of January, 1916, ren-

dered its opinion in favor of defendants, and directed findings in accordance therewith; and the Court, having heretofore made and entered its Findings of Fact and Conclusions of Law herein and being fully advised in the premises,

DOTH ORDER AND ADJUDGE and it is hereby ordered and adjudged that the plaintiffs take nothing by their action.

AND IT IS FURTHER ORDERED AND ADJUDGED that the plaintiffs [21] return and restore, and make restitution of, the gasolene power seine boat or vessel "Bernice," her engine, tackle, equipment, machinery and furniture to the defendants, or, if return thereof cannot be had, that the defendants have and recover from the plaintiffs the sum of two thousand dollars, being the value of said vessel.

AND IT IS FURTHER ORDERED AND ADJUDGED that defendants have and recover from plaintiffs their costs and disbursements herein, to be taxed by the clerk.

And it is ordered that execution be stayed thirty days.

Done in open court this 8th day of February, 1916.

ROBERT W. JENNINGS,  
Judge of the District Court.

Entered Court Journal, No. L, pages 336-337.

Copy of the within received this — day of Jany. 1916.

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Of Counsel for Plffs.

Filed in the District Court, District of Alaska, First Division. Feb. 8, 1916. J. B. Bell, Clerk. By C. Z. Denny, Deputy.

[Endorsed]: No. 1264-A. In the District Court for the Territory of Alaska, Division No. 1. E. Schoenwald and S. T. Hills and E. Schoenwald and S. T. Hills as Receivers and Assignees of the Pacific Coast & Norway Pkg. Co., a Corporation, Plaintiffs vs. Harry A. Bishop, as United States Marshal for the First Division of the District of Alaska, and D. N. McDonald, Defendants. Judgment. Gunnison & Robertson, Attorneys for Defendants. 101-105 Decker Building, Juneau, Alaska. [22]

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*In the District Court for the District of Alaska, Division Number One, at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS, and E. SCHOENWALD and S. T. HILLS, as Receivers and Assignees of the PACIFIC COAST & NORWAY PACKING COMPANY, a Corporation,

Plaintiffs,

vs.

HARRY A. BISHOP, as United States Marshal for the First Division of the District of Alaska, and D. N. McDONALD.

**Motion for New Trial.**

Come now the above-named plaintiff, by their attorneys, Winn & Burton, and feeling themselves

aggrieved, by the Findings of Fact and Conclusions of Law made, rendered and filed herein by the Court, move the Court to set aside the following Findings of Fact and Conclusions of Law, and to grant a new trial herein upon the following grounds and for the following reasons:

I.

Finding of Fact No. VII, and especially all of that portion of said Finding wherein it is stated that the deed of conveyance from the Pacific Coast & Norway Packing Company of its property to the receivers mentioned therein was made under and by virtue of the order referred to herein made by the Superior Court of the State of Washington for King County, for the reason that said Finding is not supported by any evidence in the case whatsoever but on the contrary the evidence shows that the transfer was voluntarily made by said corporation for the benefit of all its creditors and not in pursuance of any order of the Court, or any law governing receiverships in the State of Washington but that the court was simply asked [23] to ratify the free and voluntary act and deed of said corporation in the making of said conveyance, and that said Finding is against law.

II.

Finding of Fact No. VIII for the reason that said Finding of Fact is not supported by any evidence in said cause, and is contrary to the evidence, and particularly there is no evidence to support the following portion of said Finding:—"in any capacity or at all, nor at all ratified nor acquiesced in any



such assignment, or in said receivership proceedings.” On the contrary the undisputed evidence shows that the said corporation did ratify and acquiesce in the assignment made under the deed to the said Schoenwald and Hills, and did participate in the receivership proceedings, and that said Finding is against law.

### III.

Finding of Fact No. XIII for the reason that said Finding is against the undisputed testimony and evidence in this cause and is not supported by any testimony and evidence, and is against law.

### IV.

Conclusion of Law No. 1 for the reason there is no testimony or evidence in said cause to support said Conclusion of Law. In fact that said conclusion is contrary to all the evidence in said cause, and is against law.

### V.

Conclusion of Law No. II for the reason there is no testimony or evidence in said cause to support said Conclusion of Law. In fact that said conclusion is contrary to all the evidence in said cause, and is against law.

WINN & BURTON,

Attorneys for Plaintiff.

Due service of the within Motion accepted this 3d day of February, A. D. 1916.

GUNNISON & ROBERTSON,

Attorneys for Defendants.

Filed in the District Court, District of Alaska, First Division. Feb. 3, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

[Endorsed]: In the District Court for the Territory of Alaska, Division No. 1. E. Schoenwald et al., Plaintiffs, vs. Harry A. Bishop et al., Defendants. Motion for New Trial. Winn & Burton, Attorneys for Plaintiffs, Juneau, Alaska. [24]

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*In the District Court for the District of Alaska, Division Number One, at Juneau.*

No. 1264-A.

E. SCHOENWALD et al.,

vs.

HARRY A. BISHOP, etc., et al.

**Order Denying Motion for New Trial.**

Now, at this time, comes on regularly for hearing plaintiff's motion for a new trial herein. N. L. Burton, Esquire, appears in support of the motion, and R. E. Robertson, Esquire, in opposition thereto.

After hearing the argument of Mr. Burton, in support of the motion, the motion is denied.

Monday, February 7, 1916.

ROBERT W. JENNINGS,

District Judge. [25]

*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS, and E.  
SCHOENWALD and S. T. HILLS, as Re-  
ceivers and Assignees of the PACIFIC  
COAST & NORWAY PACKING COM-  
PANY, a Corporation,

Plaintiffs,

vs.

HARRY A. BISHOP, as United States Marshal for  
the First Division of the District of Alaska,  
and D. N. McDONALD,

Defendants.

**Order Extending Time to Prepare, etc., Bill of  
Exceptions.**

Upon application of plaintiffs in the above-  
entitled cause by their attorneys, Winn & Burton,—

IT IS HEREBY ORDERED that the time within  
which the above-named plaintiffs may prepare and  
present to the Court for signing and filing a Bill of  
Exceptions in the above-entitled cause shall be, and  
the same is hereby, extended for thirty (30) days  
from this date.

Done in open court this 4th day of March, A. D.  
1916.

ROBERT W. JENNINGS,

Judge.

Entered Court Journal No. L, page 359.

Filed in the District Court, District of Alaska, First Division, Mar. 4, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

[Endorsed]: No. 1264-A. In the District Court for the Territory of Alaska, Division No. 1. E. Schoenwald, et al., Plaintiffs, vs. Harry A. Bishop et al., Defendants. Order. Winn & Burton, Attorneys for Plaintiffs, Juneau, Alaska. [26]

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*In the District Court for the District of Alaska, Division Number One, at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS, and E. SCHOENWALD and S. T. HILLS, as Receivers and Assignees of the PACIFIC COAST & NORWAY PACKING COMPANY, a Corporation,

Plaintiffs,

vs.

HARRY A. BISHOP, as United States Marshal for the District of Alaska, Division Number One, and D. N. McDONALD,

Defendants.

**Assignment of Errors.**

Come now the above-named plaintiffs, and assign the following errors committed by the Court on the trial and determination of the above-entitled cause and in the Findings of Fact and Conclusions of Law made by the Court and upon the rendition of Judgment in favor of defendants herein, and upon which



plaintiffs rely in the Appellate Court, to wit, viz:

I.

The Court erred in overruling and denying plaintiffs' motion to strike from defendants' Answer all those portions of the same and each and every part thereof moved against in the Motion of plaintiffs filed herein on July 7, 1915.

II.

The Court erred in overruling plaintiffs' Demurrer to the defendants' separate and first affirmative defense [27] contained in defendants' answer, which said demurrer is filed herein on July 7, 1915.

III.

The Court erred in sustaining defendants' objection by striking out that part of the Answer contained in the deposition of L. C. Kells, being answer to direct interrogatory No. 13 propounded to said Kells, and which said part of said answer so stricken reads as follows:

“It was considered that it would be much more economical and harmonious if the company's management was unified in their hands. It was contemplated that this could be accomplished either by having the Washington receivers made ancillary receivers in Alaska or by transferring legal title to the Alaska assets to the receivers by a common law transfer. When it was found that the receivers in Washington probably could not be made sole ancillary receivers in Alaska, it was decided to adopt the other alternative. Mr. Smith cabled directions

to me as to preparing the instruments, having them executed and getting the Court's approval. I got Mr. Schoenwald and Mr. Steberg, the president of the company, in the office. I acquainted them with the contents of Mr. Smith's cable, dictated the deed and bill of sale and the order of court sanctioning the arrangement. While the instruments were being prepared we three went together before the Court with the order. I acquainted the judge with the contents of Mr. Smith's cable, which he read, and explained the purpose of the transfer, telling the Court that all interested parties were agreeable to the plan. The judge then asked Mr. Steberg whether the company desired to make the transfer. Mr. Steberg answered in the affirmative. The Court then asked Mr. Schoenwald if the receivers favored this plan and he assented. The Court then signed the order."

for the reason and upon the ground that the part so stricken was fully responsive to the question and stated the facts under which the order of the Superior Court of King County, Washington, was obtained; and the bill of sale conveying the gasoline boat, "Bernice," which was the subject of the action in the above-entitled cause was executed; and the whole of said stricken portion of the answer aforesaid was relevant and material in the above-entitled cause for the purpose of showing that the execution of the bill of sale was voluntary and the order of the Court a voluntary proceeding. [28]

## IV.

The Court erred in sustaining defendants' objection by striking out that part of the Answer contained in the deposition of L. C. Kells in answer to direct interrogatory No. 19, propounded to said Kells, and which said part of said answer so stricken reads as follows:

“The creditors have approved all the measures taken”;

for the reason and upon the ground that such testimony was material and relevant to show consent and such testimony was for the purpose of establishing the fact that the execution of the bill of sale and the order of the Superior Court of Washington were voluntary and without coercion or compulsion of law.

## V.

The Court erred in sustaining defendants' objection by striking out that part of the Answer contained in deposition of L. C. Kells in answer to cross-interrogatory No. 30 propounded to said Kells, and which said part of said answer so stricken reads as follows:

“And the company and creditors concurred in the petition”;

for the reason and upon the ground that such testimony was material and relevant to show consent and such testimony was for the purpose of establishing the fact that the execution of the bill of sale and the order of the Superior Court of Washington were voluntary and without coercion or compulsion of law.

VI.

The Court erred in sustaining defendants' objection by striking out that part of the answer contained in the deposition of L. C. Kells in answer to cross-interrogatory No. 36 propounded to said Kells, and which said part of said answer so stricken reads as follows: [29]

“The Court found that its assets exceeded its liabilities but appointed the receivers upon the statutory grounds that its property was in danger of being lost or materially impaired in value, and that it was in imminent danger of insolvency”;

for the reason and upon the ground that said testimony was relevant and material to prove or establish that the receivers were not appointed by reason of the insolvency of the Pacific Coast & Norway Packing Company, which is in itself a fact taken in connection with the execution of the bill of sale of the gasoline boat, “Bernice,” tending to prove that the proceedings were voluntary and without compulsion of law.

VII.

The Court erred in sustaining defendants' objection by striking out that part of the answer contained in the deposition of C. O. Steberg in answer to cross-interrogatory No. 24, propounded to said Steberg, and which said part of said answer so stricken reads as follows:

“And has been one general committee of all the creditors being one person for each of the four largest unsecured creditors”;



for the reason that said answer should have been admitted in response to said cross-interrogatory No. 24 propounded by the defendants and which said cross-interrogatory reads as follows:

“Has a committee of Alaskan creditors been selected and appointed in Alaska to co-operate with Schoenwald and Hills as receivers”;

and is explanatory of the first part of plaintiffs’ answer of “No.”

### VIII.

The Court erred in sustaining defendants’ objection by striking out that part of the answer contained in the deposition of C. O. Steberg, in answer to cross-interrogatory No. 26 propounded to said Steberg, and which said part of said answer so stricken reads as follows: [30]

“But the other Alaskan creditors were few and small”;

for the reason that said answer is in response to said cross-interrogatory No. 26 as explanatory thereof.

### IX.

The Court erred in sustaining defendants’ objection by striking out that part of the answer contained in the deposition of Winfield R. Smith in answer to interrogatory No. 8, propounded to said Smith, and which said part of said answer so stricken reads as follows:

“That in Washington under the court order, that in Alaska voluntarily”;

for the reason and upon the ground that said evidence was relevant and material and was direct tes-

timony in response to said interrogatory No. 8 that the bill of sale conveying the gasoline boat "Bernise" was a voluntary conveyance.

X.

The Court erred in not making, signing and filing Finding of Fact No. 2 offered by the plaintiffs and reading as follows:

"That the appointment of said plaintiffs, Shoenwald and Hills as receivers of said Pacific Coast & Norway Packing Company was voluntary on the part of said Pacific Coast & Norway Packing Company and at the suggestion and with the acquiescence, assistance and consent of said company and was done solely for the purpose of preserving and keeping intact the property and assets of said company and preventing forced sales thereof by reason of certain suits which had been brought, or were being threatened, and such appointment of said receivers was in order to secure equality among the creditors of the company; that at the time of the appointment of said plaintiffs as receivers, as aforesaid, the assets of said Pacific Coast & Norway Packing Company exceeded the [31] liabilities but such assets could not at said time be realized upon, and in order to protect and preserve the same it was deemed wise to have such receivers appointed to protect all the creditors alike, as aforesaid";

for the reason that the uncontradicted evidence in the case supports said finding and the whole thereof as it appears from said uncontradicted evidence that

the appointment of Schoenwald and Hills as receivers by the Superior Court of King County, Washington, was voluntary and with the acquiescence, assistance and consent of said Pacific Coast and Norway Packing Company.

## XI.

The Court erred in not making, signing and filing Finding of Fact No. 3, offered by the plaintiffs and reading as follows:

“That on, to wit, the 26th day of October, 1914, the said Pacific Coast & Norway Packing Company to further protect all the creditors alike and avoid the expense and occasion of appointing ancillary receivers in Alaska, and for the sake of efficient, economic and unified administration of the assets of said Pacific Coast & Norway Packing Company, to the benefit of all the creditors alike, voluntarily and of its own free will and accord, conveyed all of its property, both real and personal, to the said E. Schoenwald and E. T. Hills in trust for the benefit of all creditors of said corporation; the real estate being conveyed by deed and the personal property, including the gasoline boat ‘Bernice,’ by bill of sale, and the said Schoenwald and Hills immediately thereafter took possession of all of such personal property, including the said gasoline boat, ‘Bernice’ ”; [32]

for the reason that said Finding of Fact is sustained by the uncontradicted evidence in the case.

## XII.

The Court erred in not making, signing and filing

Finding of Fact No. 4, offered by the plaintiff and reading as follows:

“That at or about the time of the execution of the deed and bill of sale aforesaid, by the said Pacific Coast & Norway Packing Company conveying all of its property to said Schoenwald and Hills, as aforesaid, Mr. Robertson of the firm of Gunnison & Robertson, who were the attorneys for, and representing the claim of, D. N. McDonald, one of the defendants herein, the said Robertson having charge of the matter, was notified that the Pacific Coast & Norway Packing Company were about to execute such deed and bill of sale, and was asked to forward the claim of said McDonald which consisted of two promissory notes then in the possession of said Robertson, to the receivers for collection, and the said Robertson did, at or about said time of the execution of said deed and bill of sale, take down the address of said receivers for the purpose of submitting said claim of D. N. McDonald to said receivers. That at said time neither the said Robertson nor the firm of Gunnison & Robertson, nor the said D. N. McDonald, the defendant, made any objection to or in *any showed* any disapproval to the execution of such deed and bill of sale conveying all the property to said Schoenwald and Hills for the benefit of the creditors as aforesaid. That the first intimation the plaintiffs had of any dissatisfaction on the part of said D. N. McDonald to the said conveyance by said Pacific Coast & Nor-



way Packing Company to the said Schoenwald and Hills of all of its property, including [33] the gasoline boat 'Bernice,' was several months thereafter when the said D. N. McDonald attached said gasoline boat, 'Bernice.' That said Gunnison & Robertson at all times herein mentioned knew of the appointment of said Schoenwald and Hills as receivers aforesaid";

for the reason that said Finding is material and is fully sustained by all the evidence in the case and there is no evidence which contradicts the facts set forth in said Finding.

### XIII.

The Court erred in not making, signing and filing Finding of Fact No. 6 offered by the plaintiff and reading as follows:

"That every trustee or director and all the stockholders of the Pacific Coast & Norway Packing Company desired, approved and ratified giving the said conveyance to said Schoenwald and Hills as trustees aforesaid, conveying the title to the Alaska assets, and approved the execution of the instruments transferring such assets to said E. Schoenwald and S. T. Hills as trustees; that this approval was not by a formal meeting of the stockholders but was obtained by Mr. Schoenwald, one of the receivers, communicating with the great majority of the stockholders and personally conferring with the rest of them; that the consent and approval by

all of the directors, as well as all of the stockholders, to the execution of the instruments transferring the legal title of the Alaska assets to the receivers was obtained in the manner aforesaid”;

for the reason that said Finding is established by all of the evidence in the case such evidence establishing the acquiescence and consent of the Pacific Coast & Norway Packing Company to the execution of the bill of sale conveying said gasoline boat, “Bernice.”  
[34]

#### XIV.

The Court erred in not making, signing and filing Finding of Fact No. 7 offered by the plaintiff and reading as follows:

“That on, to wit, the 26th day of October, A. D. 1914, the Superior Court of King County, State of Washington, in the case of Roy W. Nevin, plaintiff, vs. Pacific Coast & Norway Packing Company, a corporation, defendant, cause No. 103,639, made and entered an order authorizing the Pacific Coast & Norway Packing Company to convey its Alaska assets to E. Schoenwald and S. T. Hills, and with the consent of said Pacific Coast & Norway Packing Company, which said corporation was present and represented in court at the time of making said order”;

for the reason that said Finding is sustained by all of the evidence in said case and establishes the fact that the proceedings in connection with the execution of the bill of sale were voluntary.

## XV.

The Court erred in not making, signing and filing Finding of Fact No. 8, offered by the plaintiffs and reading as follows:

“That the transfer of the assets by said Pacific Coast & Norway Packing Company to E. Schoenwald and S. T. Hills was not made under and by virtue of any Washington statute, or any statute, or by compulsion of law, but the instruments were prepared and executed voluntarily by said company with a view of passing legal title to the said trustees in accordance with the principles of common law, and for the benefit of all [35] the creditors of said corporation alike”;

for the reason that said Finding is sustained by all of the evidence in the case and there is no evidence contradicting the facts contained in said Finding.

## XVI.

The Court erred in not making, signing and filing Conclusions of Law Nos. 1, 2, 3, 4 and 5 offered and tendered by the plaintiffs, based upon the Findings of Fact tendered and offered by said plaintiffs.

## XVII.

The Court erred in making Finding of Fact No. 7, and especially all that portion of said Finding wherein it is stated that the deed of conveyance from the Pacific Coast & Norway Packing Company of its property to the receivers mentioned therein was made under and by virtue of the order made by the

Superior Court of King County, Washington; for the reason that said Finding is not supported by any evidence in the case whatsoever, but, on the contrary, the evidence shows that the transfer was voluntarily made by said corporation for the benefit of all its creditors and not in pursuance of any order of the court or any law governing receiverships in the State of Washington but that the Court was simply asked to ratify the free and voluntarily act and deed of said corporation in the making of said conveyance; and said Finding is against law.

#### XVIII.

The Court erred in making Finding of Fact No. 8 for the reason that said Finding of Fact is not supported by any evidence in said cause, and is contrary to the evidence, and particularly there is no evidence to support the following portion of said finding, viz.:

“In any capacity or at all, nor at all ratified  
[36] nor acquiesced in any such assignment, or  
in said receivership proceedings ”

That on the contrary, the undisputed evidence shows that the said corporation did ratify and acquiesce in the assignment made under the deed to said Schoenwald and Hills, and did participate in the receivership proceedings; and that said Finding is against law.

#### XIX.

The Court erred in making Finding of Fact No. 13, for the reason that said Finding is against the undisputed testimony and evidence in this cause



and is not supported by any testimony or evidence, and is against law.

### XX.

The Court erred in making Conclusion of Law No. 1 based upon said Findings of Fact for the reason there is no testimony or evidence in said cause to support said Conclusion of Law. That in fact said Conclusion is contrary to all the evidence in said cause, and is against law.

### XXI.

The Court erred in making Conclusion of Law No. 2 for the reason there is no testimony or evidence in said cause to support said Conclusion of Law. That in fact said Conclusion of Law is contrary to all the evidence in said cause and is against law.

### XXII.

The Court erred in entering its Decree and Judgment for and on behalf of the defendants herein, decreeing that the plaintiffs take nothing by their action and that they return and restore and make restitution of the gasoline power seine boat or vessel "Bernice"; because said Decree is not [37] sustained by, but is contrary to, the law and evidence, and is not sustained by the evidence in said cause, and said Judgment and Decree should have been in favor of the plaintiffs herein.

### XXIII.

The Court erred in overruling the motion of plaintiffs for a new trial herein.

WINFIELD R. SMITH, and  
WINN & BURTON,

Attorneys for Plaintiffs.

Copy of the foregoing Assignment of Errors received this 27th day of May, 1916.

GUNNISON & ROBERTSON,  
Attorneys for Defendants. [38]

Filed in the District Court, District of Alaska, First Division, May 27, 1916. J. W. Bell, Clerk.  
By L. E. Spray, Deputy.

[Endorsed]: No. 1264-A. In the District Court for the Territory of Alaska, Division No. 1. E. Schoenwald, et al., Plaintiffs, vs. Harry A. Bishop, et al., Defendants. Assignment of Errors. [39]

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*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS, and E. SCHOENWALD and S. T. HILLS, as Receivers and Assignees of the PACIFIC COAST & NORWAY PACKING COMPANY, a Corporation,

Plaintiffs,

vs.

HARRY A. BISHOP, as United States Marshal for the First Division of the District of Alaska, and D. N. McDONALD,

Defendants.

**Petition for Writ of Error.**

To the Honorable ROBERT W. JENNINGS,  
Judge of the District Court for the District of Alaska:

Comes now E. Schoenwald and S. T. Hills, and

E. Schoenwald and S. T. Hills as Receivers and Assignees of the Pacific Coast & Norway Packing Company, a corporation, plaintiffs herein, by their attorneys, Winn & Burton, and complaining that in the record and proceedings had in said above-entitled cause, and also in the rendition of the Judgment in the said above-entitled cause in the District Court for the District of Alaska, Division No. 1, against the said above-named plaintiffs on the 8th day of February, 1916, wherein said Court ordered and adjudged that the plaintiffs take nothing by its action and that they restore, and make restitution of the gasoline power seine boat or vessel, "Bernice," manifest error hath happened to the great damage of said plaintiffs, as will more fully appear from [40] the Assignments of Error filed herewith.

WHEREFORE these plaintiffs pray for the allowance of a Writ of Error for the corrections of the errors complained of, and that a transcript of the record and proceedings, with all things concerning the same, duly authenticated, and such other orders and process as may cause the said errors to be corrected, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 27th day of May, A. D. 1916.

WINFIELD R. SMITH,

WINN & BURTON,

Attorneys for Plaintiffs.

Copy of the foregoing Petition for Writ of Error

and allowance of same received this 27th day of May, 1916.

GUNNISON & ROBERTSON,  
Attorneys for Defendant.

Filed in the District Court, District of Alaska, First Division, May 27, 1916. J. W. Bell, Clerk. By L. E. Spray, Deputy.

[Endorsed]: No. 1264—A. In the District Court for the Territory of Alaska, Division No. 1. E. Schoenwald and S. T. Hills and E. Schoenwald and S. T. Hills as Receivers and Assignees of Pacific Coast & Norway Packing Company, a Corporation, Plaintiffs, vs. Harry A. Bishop, as United States Marshal for the First Division of the District of Alaska, and D. N. McDonald, Defendants. Petition for Writ of Error and Allowance of Same. Winn & Burton, Attorneys for Plaintiffs. Juneau, Alaska. [41]



*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS, and E.  
SCHOENWALD and S. T. HILLS as Re-  
ceivers and Assignees of the PACIFIC  
COAST & NORWAY PACKING COM-  
PANY, a Corporation,

Plaintiffs,

vs.

HARRY A. BISHOP, as United States Marshal  
for the First Division of the District of  
Alaska, and D. N. McDONALD,

Defendants.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS that  
we, E. Schoenwald and S. T. Hills, individually and as  
assignees and receivers, the above-named plaintiffs,  
as principals, and American Surety Company of  
New York, a corporation organized under the laws  
of the State of New York and authorized to do  
business in Alaska and to sign bonds as surety  
therein, as surety, are held and firmly bound unto  
the above-named defendants, in the full sum of  
two Hundred and Fifty (\$250) Dollars, lawful  
money of the United States of America to be paid  
to the said defendants, their successors, heirs,  
executors, administrators or assigns, for which pay-  
ment well and truly to be made we bind ourselves,  
and each of us, and severally, and our and each of

our heirs, executors, administrators, successors and assigns firmly by these presents.

Sealed with our seal and dated this 14th day of March, A. D. 1916.

The condition of this obligation is such,

THAT, WHEREAS, the above-named E. Schoenwald and S. T. Hills, individually and as assignees and receivers, plaintiffs, are suing [42] out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the Decree and Judgment rendered in the above-entitled suit on the 8th day of February, A. D., 1916, in the District Court for the District of Alaska, Division Number One, at Juneau,

NOW THEREFORE, the condition of the above obligation is such that if the above-named E. Schoenwald and S. T. Hills, individually and as assignees and Receivers, plaintiffs, shall prosecute said Writ of Error to effect, and answer all damages and costs if they fail to make good their plea then this obligation shall be void; otherwise the same shall remain in full force and virtue.

E. SCHOENWALD,

Individually as Receiver and Assignee.

S. T. HILLS,

Individually as Receiver and Assignee.

AMERICAN SURETY COMPANY OF  
NEW YORK,

By B. S. H. MELROSE,

Resident Vice-President.

Attest: E. G. GHOLSON,

Resident Assistant Secy.

(Surety Company Seal)

The foregoing Bond is approved by me as to form and amount, sufficiency and surety as a cost bond only.

Dated this 27th day of May, 1916.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska, First Division. May 27, 1916. J. W. Bell, Clerk. By L. E. Spray, Deputy.

[Endorsed]: No. 1264-A. In the District Court for the Territory of Alaska, Division No. 1. E. Schoenwald and S. T. Hills and E. Schoenwald and S. T. Hills as Receivers, etc., Plaintiffs vs. Harry A. Bishop, as United States Marshal for the 1st Div. Dist. of Alaska and D. N. McDonald, Defendants. Bond on Writ of Error. Winn & Burton, Attorneys for Plaintiffs, Juneau, Alaska. [43]

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*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS, and E. SCHOENWALD and S. T. HILLS, as Receivers and Assignees of the PACIFIC COAST & NORWAY PACKING COMPANY, a Corporation,

Plaintiffs,

vs.

HARRY A. BISHOP, as United States Marshal for the First Division of the District of Alaska, and D. N. McDONALD,

Defendants.

**Writ of Error.**

United States of America,—ss.

The President of the United States of America, to  
the Honorable ROBERT W. JENNINGS,  
Judge of the District Court for the District of  
Alaska, Division Number One, GREETING:

Because in the record and proceedings as also in  
the rendition of the Judgment of a plea in the said  
District Court, Division No. 1 thereof, before you,  
between E. Schoenwald and S. T. Hills, and E.  
Schoenwald and S. T. Hills as Receivers and As-  
signees of the Pacific Coast & Norway Packing  
Company, a corporation, plaintiffs, and Harry A.  
Bishop, as United States Marshal for the First  
Division of the District of Alaska, and D. N. Mc-  
Donald, defendants, a manifest error hath happened  
to the great damage of the said plaintiffs as set forth  
and appears by the Petition herein as well as shown  
by the Assignments of Error,— [44]

We being willing that error, if any hath hap-  
pened, should be duly corrected, and full and speedy  
justice done to the parties aforesaid in that be-  
half, do command you, if judgment be therein  
given, that then under your seal, distinctly and  
openly, you send the record and proceedings afore-  
said, together with all things concerning the same,  
to the Justices of the United States Circuit Court  
of Appeals for the Ninth Circuit, in the city of  
San Francisco, in the State of California, together  
with this Writ, so as to have the same at the said  
place and said court on or before thirty days from



the date hereof, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors, which of right and according to the laws and customs of the United States, ought to be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, and the seal of the District Court for Alaska this 27th day of May, A. D. 1916.

[Seal] J. W. BELL,  
Clerk of the District Court for the District of  
Alaska, Division Number One.

By John Reed,  
Deputy.

Said Writ is by me allowed this 27th day of May,  
A. D. 1916.

ROBERT W. JENNINGS,  
Judge of the District Court for the District of  
Alaska, Division Number One.

Due service of the within Writ of Error acknowledged this 27th day of May A. D. 1916.

GUNNISON & ROBERTSON,  
Attorneys for Defendants. [45]

Filed in the District Court, District of Alaska,  
First Division, May 27, 1916. J. W. Bell, Clerk.  
By L. E. Spray, Deputy. [46]

[Endorsed]: No. 1264-A. In the District Court  
for the Territory of Alaska, Division No. 1. E.  
Schoenwald and S. T. Hills and E. Schoenwald and  
S. T. Hills as Receivers and Assignees of Pacific  
Coast & Norway Packing Company, a Corporation,

Plaintiffs, vs. Harry A. Bishop, as United States Marshal for the First Division of the District of Alaska, and D. N. McDonald, Defendants. Writ of Error.

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*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS, and E.  
SCHOENWALD and S. T. HILLS, as Re-  
ceivers and Assignees of the PACIFIC  
COAST & NORWAY PACKING COM-  
PANY, a Corporation,

Plaintiffs,

vs.

HARRY A. BISHOP, as United States Marshal  
for the First Division of the District of  
Alaska, and D. N. McDONALD,  
Defendants.

**Citation (on Writ of Error).**

United States of America.

The President of the United States to Harry A.  
Bishop, as United States Marshal for the Dis-  
trict of Alaska, Division Number One, and D.  
N. McDonald, and to Messrs. Gunnison and  
Robertson, GREETING:

You are hereby cited and admonished to be and  
appear in the United States Circuit Court of Ap-  
peals for the Ninth Circuit, to be holden in the city  
of San Francisco in the State of California, within  
thirty days from the date of the service upon you

and the date of this Citation, pursuant to a Writ of Error filed in the clerk's office of the District Court for the District of Alaska, Division Number One, in a case wherein E. Schoenwald and S. T. Hills and E. Schoenwald and S. T. Hills as Receivers and Assignees of the Pacific Coast & Norway Packing Company, a corporation, are plaintiffs and plaintiffs in error, and you, the said Harry A. Bishop as United States Marshal for the First Division [47] of the District of Alaska, and D. N. McDonald, are defendants and defendants in error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 27th day of May, A. D. 1916.

ROBERT W. JENNINGS,  
Judge.

[Seal]

Attest: J. W. BELL,  
Clerk.

By John Reed,  
Deputy.

Due and personal service of the foregoing Citation is hereby admitted on this 27th day of May, A. D. 1916.

GUNNISON & ROBERTSON,  
Attorneys for Defendants. [48]

Filed in the District Court, District of Alaska, First Division. May 27, 1916. J. W. Bell, Clerk. By L. E. Spray, Deputy. [49]

[Endorsed]: No. 1264-A. In the District Court for the Territory of Alaska, Division No. 1. E. Schoenwald and S. T. Hills and E. Schoenwald and S. T. Hills as Receivers and Assignees of Pacific Coast & Norway Packing Company, a Corporation, Plaintiffs, vs. Harry A. Bishop, as United States Marshal for the First Division of the District of Alaska, and D. N. McDonald, Defendants. Citation (on Writ of Error.)

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*In the District Court for the District of Alaska,  
Division No. One, At Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS, and E.  
SCHOENWALD and S. T. HILLS, as Re-  
ceivers and Assignees of the PACIFIC  
COAST & NORWAY PACKING COM-  
PANY, a Corporation,

Plaintiffs,

vs.

H. A. BISHOP, as United States Marshal for the  
District of Alaska, Division No. One, and D.  
N. McDONALD,

Defendants.

**Bill of Exceptions.**

Filed in the District Court, District of Alaska,  
First Division. May 2, 1916. J. W. Bell, Clerk.  
By ———, Deputy. [50]



*In the District Court for the District of Alaska,  
Division No. One, at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS, and E.  
SCHOENWALD and S. T. HILLS, as Re-  
ceivers and Assignees of the PACIFIC  
COAST & NORWAY PACKING COM-  
PANY, a Corporation,

Plaintiffs,

vs.

H. A. BISHOP, as United States Marshal for the  
District of Alaska, Division No. One, and D.  
N. McDONALD,

Defendants.

BE IT REMEMBERED, that this cause came on  
regularly for trial on the 20th day of December, 1915,  
before the Honorable Robert W. Jennings, Judge of  
the District Court for the District of Alaska, Divi-  
sion No. One, holden at Juneau; that the plaintiffs  
appeared by their counsel, Messrs. Winn & Burton;  
and defendants appeared by their counsel, Messrs.  
Gunnison & Robertson;

Whereupon the following proceedings were had;  
[51]

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[52]

Judge WINN.—We first offer in evidence, may it please the Court, the following documents: The complaint of Roy W. Nevin, filed in the Superior Court

of King County, Washington, in cause against the Pacific Coast & Norway Packing Company, being cause No. 103,639 of that court, and which was offered in evidence in cause No. 1171-A of this court, and I will ask the privilege, of course, of obtaining a certified copy of that pleading, as this is a part of the files of 1171-A, in which application was made to this Court, as your Honor will remember, for the appointment of a receiver.

Mr. ROBERTSON.—If the Court please, at this time we object to the introduction of any proof regarding either Mr. Schoenwald or Mr. Hills being Receivers of this company, on the grounds that it is incompetent, irrelevant and immaterial, and that neither Mr. Hills nor Mr. Schoenwald have any rights in this court as Receivers of a court of foreign jurisdiction; and unless that is a certified copy of the paper itself, we object to that particular evidence as not the best evidence.

The COURT.—Now, the first objection is overruled.

Mr. ROBERTSON.—We take an exception. We object to the introduction, now, as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

Judge GUNNISON.—We will waive the reading now, and you may read it any time before the close of the case.

(Whereupon said complaint was received in evidence and marked Plaintiffs' Exhibit "A.")

Judge WINN.—Following that up, we offer in evidence a certified copy of the answer in this same

cause, which was filed in the Superior Court of King County by the Pacific Coast and Norway Packing Company to the complaint which we have just offered in evidence.

Mr. ROBERTSON.—We make the same objection, if the Court please.

The COURT.—Same ruling. [53]

(Whereupon said answer was received in evidence and marked Plaintiffs' Exhibit "B.")

Judge WINN.—We also offer in evidence the order made in the same cause by the Superior Court of King County, appointing Mr. Schoenwald Receiver, which is dated September 16, 1914.

Mr. ROBERTSON.—Same objection, if the Court please.

The COURT.—Same ruling.

(Whereupon said order was received in evidence and marked Plaintiffs' Exhibit "C.")

Judge WINN.—We next offer in evidence a certified copy of Mr. Schoenwald's bond, filed in the Superior Court of King County, State of Washington, which is a receiver's bond.

Mr. ROBERTSON.—Same objection.

The COURT.—Same ruling.

(Whereupon said bond was received in evidence, and marked Plaintiffs' Exhibit "D.")

Judge WINN.—We offer in evidence E. Schoenwald's oath of office, it being a certified copy of the original oath of office filed in the Superior Court of King County.

Mr. ROBERTSON.—Same objection.

The COURT.—Same ruling.



(Whereupon said oath of office was received in evidence, and marked Plaintiffs' Exhibit "E.")

Judge WINN.—We now offer in evidence a certified copy of an order made by the Superior Court of King County, appointing S. T. Hills a coreceiver, in the same cause.

Mr. ROBERTSON.—Same objection.

The COURT.—Same ruling.

(Whereupon said order was received in evidence, and marked Plaintiffs' Exhibit "F.")

Judge WINN.—The next is a certified copy of S. T. Hills' receiver's bond; the original order, of course, was made by the Superior [54] Court of King County, State of Washington, in this same cause.

Mr. ROBERTSON.—Same objection.

The COURT.—Same ruling.

(Whereupon said receiver's bond was received in evidence and marked Plaintiffs' Exhibit "G.")

Judge WINN.—Also a certified copy of the original oath of office of Mr. Hills as receiver, which was made by the same court in the same cause.

Mr. ROBERTSON.—Same objection.

The COURT.—Same ruling.

(Whereupon said oath of office was received in evidence, and marked Plaintiffs' Exhibit "H.")

Judge WINN.—We also offer in evidence the certificate of the Clerk of the Court of King County, State of Washington, being in the same court in which this action is pending, certifying that these several exhibits or papers which I just offered in evidence are full, true and correct copies of the origi-

nals, and which will show the certificate of Boyd J. Tallman certifying that W. K. Sickels is the clerk of the court, and the certificate of Sickels certifying that Judge Tallman is a Judge of the court; all these papers are enumerated in the certificate I just offered in evidence.

Mr. ROBERTSON.—Same objection.

The COURT.—Same ruling.

(Whereupon said certificate was received in evidence and marked Plaintiffs' Exhibit "I.")

Mr. ROBERTSON.—If it is for the purpose of proving jurisdiction of the court, I object to it—it is not the best evidence.

The COURT.—Objection overruled.

Judge WINN.—I desire now to read in evidence, if the Court please, the deposition of Winfield R. Smith, which was taken by stipulation, made and entered into by and between the attorneys in this case.  
[55]

Mr. ROBERTSON.—We have the same general objection to the general offer of the testimony of Mr. Smith. We object to any testimony so far as the receivership is concerned, on the ground that it is incompetent, irrelevant and immaterial. Of course we will object to the individual questions as they come up.

The COURT.—The general objection is overruled.

(Whereupon the deposition of Winfield R. Smith was begun, but because of objections by counsel for the defendant, to questions and answers, the reading of said deposition was deferred until later.) (See page 26.)

Judge WINN.—We will now offer to read the deposition of L. C. Kells.

(Whereupon said deposition was read as follows:)

**Deposition of Lucas C. Kells.**

Int. 1. Please state your name, residence and occupation.

A. My name is Lucas C. Kells. My residence is 1948—8th Avenue, West, Seattle, and I am an attorney at law.

Mr. ROBERTSON.—If the Court please, we make the same objection to any evidence of Mr. Kells regarding the receivership, as incompetent, irrelevant and immaterial.

The COURT.—That general objection is overruled.

Int. 2. If you have stated in your answer to the preceding, that you are an attorney at law, please state with whom, if any one, you are engaged in the practice of law, and how long you have been so engaged.

Mr. ROBERTSON.—We think that is immaterial, but it is preliminary.

The COURT.—It is preliminary.

A. I am employed in the office of Winfield R. Smith, and have been since March, 1913.

Int. 3. If you have stated that you are engaged in the practice of the law with Mr. Winfield R. Smith, state whether through this connection you have, acting for Mr. Smith, performed legal services for the above-named E. Schoenwald and S. T. Hills as Receivers of the Pacific Coast & Norway Packing [56] Company.

(Deposition of Lucas C. Kells.)

Mr. ROBERTSON.—We object to that, if the Court please, as not the best evidence.

The COURT.—Objection overruled.

A. Yes.

Int. 4. Did you, in connection with your employment or engagement by Mr. Smith, perform legal services for the Pacific Coast & Norway Packing Company, prior to the appointment of said Schoenwald and Hills as receivers? And state what, if any, part you took, as attorney, in connection with your relation to Mr. Smith, for said corporation in the suit brought against it for the appointment of receivers, and in which receivers were appointed.

Mr. ROBERTSON.—We object to that upon the same grounds, and further, it asks two questions at once.

The COURT.—Objection overruled.

A. Yes, I drew the answer of the company in that case and had Mr. Steberg verify it.

Int. 5. State whether the said corporation has since employed any other attorney in the receivership matters.

Mr. ROBERTSON.—We object to that as immaterial.

The COURT.—Objection overruled.

A. No, not to my knowledge.

Int. 6. Please state whether or not you are familiar with and have personal knowledge of the reasons why receivers were appointed for said Pacific Coast & Norway Packing Company.

Mr. ROBERTSON.—We object to that as incom-



(Deposition of Lucas C. Kells.)

petent, irrelevant and immaterial—that is the same question that they asked Mr. Smith—not the best evidence, and it is immaterial if he knew why they were appointed—also a conclusion of law.

The COURT.—Objection overruled.

A. Yes. [57]

Int. 7. If so, state such reasons in full.

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial, and calls for a conclusion of law, and not the best evidence. The best evidence is the record of the court. Why the court appointed the receiver—that is the gist of it. It is not how it came that they were appointed—how they were appointed. It seems to me there is a lot of distinction there, if the Court please.

The COURT.—Objection overruled.

A. Owing to a number of unexpected business reverses, the company was unable to pay its current obligations. Its bank account and much of its salmon pack were tied up by garnishments, and other suits were being threatened. In order to secure equality among the creditors of the company and to preserve the assets, it was deemed wise by the company's officers and directors, and by the principal creditors and stockholders, to have receivers appointed.

The COURT.—The defendant is allowed an exception.

Int. 8. Were any other receivers appointed for said corporation?

Mr. ROBERTSON.—We object to that as immaterial.

(Deposition of Lucas C. Kells.)

The COURT.—Objection overruled.

A. No.

Int. 9. State, if you know, what disposition was made of the property, real and personal, of the Pacific Coast & Norway Packing Company upon the appointment and qualification of Mr. Schoenwald as receiver, and state expressly as to the property and assets located in Alaska, including the gasoline boat “Bernice.” What further, if anything, was done with such property and assets upon the appointment and qualification of Mr. Hills as coreceiver?

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial, multifarious, and we do not think it is the [58] best evidence, calls for a conclusion, is hearsay, and an assumption.

The COURT.—Objection overruled.

A. Mr. Schoenwald at once took possession of all the property wherever situated, including the “Bernice.” Mr. Hills, when appointed, simply joined in Mr. Schoenwald’s possession and control.

Judge GUNNISON.—We move against the answer, on the same ground that it is a statement or conclusion—not what actually took place—hearsay, and an assumption.

The COURT.—Overruled.

Int. 10. State whether the said receivers have been conducting the business of the said Pacific Coast & Norway Packing Company in Alaska, and if so, when they, or Mr. Schoenwald, began to do so.

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial; calls for a con-

(Deposition of Lucas C. Kells.)

clusion of the witness, and is hearsay.

The COURT.—Objection overruled.

A. Yes, from the time of their respective appointments.

Int. 11. State whether the real and personal property belonging to said corporation in the territory of Alaska, including the said gasoline boat "Bernice," was transferred by written instruments delivered to the receivers; and if so, when.

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial, calls for a conclusion of law, and not the best evidence.

The COURT.—Objection overruled.

A. Yes, October 26, 1914.

Int. 12. You will please examine exhibits attached to the deposition of Winfield R. Smith and state, if you know, what was the occasion for the execution of these instruments, and whether they were executed and delivered voluntarily by the [59] Pacific Coast & Norway Packing Company.

Mr. ROBERTSON.—We object to that as not the best evidence, calls for a conclusion of law, is incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

A. The instruments were executed in order to give the receivers legal title to the assets in Alaska and thus avoid the necessity of ancillary receivers being appointed there. The action was entirely voluntary on the company's part.

Int. 13. What, if anything, did you have to do with the execution and delivery of said instruments,

(Deposition of Lucas C. Kells.)

and state fully the circumstances and conditions surrounding and leading up to their execution.

Mr. ROBERTSON.—We make the same objection.

The COURT.—Objection overruled.

Mr. ROBERTSON.—We move to strike the balance of the answer after the first sentence, on the ground that the same is incompetent, irrelevant and immaterial, calls for a conclusion of the witness, is hearsay and not the best evidence; and it is a self-serving declaration.

The COURT.—All of the answer after the word “centered” in the sixth line of the answer will be stricken.

A. I prepared the instruments and they were executed and delivered in my presence. The officers, principal stockholders and creditors concurred in wishing to have the control of all the company’s affairs in the hands of the company’s receivers at Seattle, where its principal office had always been, and where its business interests were centered.

Int. 14. State whether or not, if you know, the trustees and stockholders of the Pacific Coast & Norway Packing Company authorized or acquiesced in the execution and delivery of said instruments.

[60]

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial, calls for a conclusion of the witness, is not the best evidence. The best evidence would be the minutes or resolutions of the company.



(Deposition of Lucas C. Kells.)

The COURT.—Objection overruled.

A. Yes, it was approved and acquiesced in by both.

Judge GUNNISON.—We move to strike all after the word “Yes” in that answer, as not responsive to the question, and not the best evidence, and hearsay.

The COURT.—Motion denied.

Int. 15. State fully whether or not, if you know, the Superior Court of King County, being the court of the receivership, compelled the execution and delivery of the said instruments, or whether the same were executed voluntarily by the said Pacific Coast & Norway Packing Company without compulsion.

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial, not the best evidence, and calls for a conclusion of law.

The COURT.—The objection is overruled.

Judge GUNNISON.—We move to strike answer 15, on the ground that the answer is not responsive to the question, is hearsay, not the best evidence, and states a conclusion of the witness as to what and why the Court acted or did not act.

The COURT.—Motion denied; and to all the objections you make that the Court does not allow, you are allowed an exception, and the record may so show.

A. The Court did not compel the transfer. It was fully planned, agreed upon and the instruments in process of preparation before any court order was obtained or the court acquainted with the plan. The purpose of the order was to have the approval of the Court.

Int. 16. Attached to the deposition of Winfield

(Deposition of Lucas C. Kells.)

R. Smith is a certified copy of an order of the Superior Court of King County [61] authorizing transfer of property to the receivers. Please examine said order and state if you know why and under what circumstances the said order was entered and why the said written transfers were ordered executed and delivered.

Mr. ROBERTSON.—We object to that.

The COURT.—Objection overruled.

A. This I have already answered.

Int. 17. State whether there has been any active co-operation throughout the receivership between the receivers and creditors of Pacific Coast & Norway Packing Company; and if so, state by and through whom the said creditors actively co-operated with said receivers.

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial, and not the best evidence.

The COURT.—Objection overruled.

A. The principal creditors were consulted from the beginning. On September 22, 1914, a creditors' meeting was held and a committee chosen to represent the general creditors and to co-operate with the receivers.

Int. 18. If you have mentioned a creditors' committee, state when such committee was selected, how and by whom, of whom it consists, and why these persons were selected, if you know.

Mr. ROBERTSON.—The same objection, if the Court please, to that question.

(Deposition of Lucas C. Kells.)

The COURT.—Objection overruled.

A. As said, a well attended meeting of the creditors was had and a committee chosen by it. The committee consists of Mr. Pattullo, Mr. Speckert, Mr. Morganstern and Mr. McLean. These men are representatives of the four largest unsecured creditors.

Int. 19. State, if you know, what at that time was and since has been, the attitude of the creditors of Pacific Coast & Norway Packing Company towards the assets in Alaska, and [62] especially towards the immediate delivery of the said assets to the receivers upon their appointment, and the retention of such assets since by the receivers, and towards the written transfers of the said assets hereinabove mentioned and set forth.

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial, calls for a conclusion of the witness, calls for hearsay, and is not the best evidence.

The COURT.—Objection sustained.

(Answer 19 not read.)

Int. 20. State whether the conveyance of the assets of said Pacific Coast & Norway Packing Company unto said receivers, including the gasoline boat "Bernice," was made under and by virtue of any Washington statute or under compulsion of law, or whether the deeds of conveyance were intended common law deeds. Answer fully.

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial, calls for a conclu-

(Deposition of Lucas C. Kells.)

sion of the witness as well as for a conclusion of law, is not the best evidence. That is the very gist of the case, for the Court to pass upon.

The COURT.—Objection overruled.

A. The transfer of assets was not made under and by virtue of any Washington statute. The laws of Washington are full and explicit on the matter of conveyances for the benefit of creditors, but none of these provisions were thought of and no attempt was made to comply with them. We wished a transfer which would be recognized in Alaska and elsewhere, and hence paid no regard to purely local statutes. The instruments were prepared and executed voluntarily with a view of passing legal title to the receivers in accordance with the principles of common law.

Int. 21. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at [63] issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in the cause? If yes, set forth the same fully and at large in your answer.

Mr. ROBERTSON.—We make the same objection to that, and also that it is too general, and that is too incompetent, irrelevant and immaterial.

The COURT.—There can be no objection to the question.

Judge GUNNISON.—We move to strike the answer as incompetent, irrelevant and immaterial.



(Deposition of Lucas C. Kells.)

The COURT.—The entire answer may be stricken.

(Answer not read.)

Cross-interrogatories.

Cross-int. 1. In what court, and in what state, were E. Schoenwald and S. T. Hills appointed receivers for the Pacific Coast & Norway Packing Company?

A. In the Superior Court of the State of Washington for King County.

Cross-int. 2. Was the gasoline boat "Bernice" in the State of Washington at any time during the period from September 15, 1914, to April 28, 1915?

A. I think not.

Cross-int. 3. Was the gasoline boat "Bernice" at all times within the jurisdiction of the District Court of the First Division of the Territory of Alaska, during the period from September 15, 1914, to April 28, 1915? If your answer is in the negative, state the periods of time, giving dates, that said boat was outside the jurisdiction of said court.

A. I believe it was at or near Petersburg, Alaska, during this time.

Cross-int. 4. Was the gasoline boat "Bernice," during the period from September 15, 1914, to February 8, 1915, licensed under [64] documents issued by the officials of the United States Customs District for Alaska? A. I do not know.

Cross-int. 5. Was any bill of sale or other document conveying the gasoline boat "Bernice" from the Pacific Coast & Norway Packing Company to

(Deposition of Lucas C. Kells.)

E. Schoenwald and S. T. Hills, as receivers, or to either of them as receivers, filed for record or recorded with the United States Custom officials for the Customs District of Alaska, at any time prior to February 10, 1915? If your answer is in the affirmative, state the date that said bill of sale or other document was recorded with said officials.

A. No, none has ever been recorded.

Cross-int. 6. Have E. Schoenwald and S. T. Hills, or either of them, ever been appointed receivers of the Pacific Coast & Norway Packing Company by any court of the District or Territory of Alaska? A. No, I think not.

Cross-int. 7. Was the conveyance or transfer of the gasoline boat "Bernice" to Schoenwald and Hills, or to either of them, made prior to the appointment of those gentlemen as receivers by the Superior Court of Kings County, State of Washington?

A. No, subsequent to their appointment.

Cross-int. 8. Did Honorable Everett Smith, Judge of the Superior Court of King County, for the State of Washington, on or about October 26, 1914, make an order directing that the Pacific Coast & Norway Packing Company transfer all of its personal assets in Alaska to Schoenwald and Hills, as receivers? A. Yes.

Cross-int. 9. Was the bill of sale or conveyance of the gasoline boat "Bernice" to Schoenwald and Hills as receivers, made in pursuance to the order of the Superior Court of King County, [65] entered by that court on or about October 26, 1914?

(Deposition of Lucas C. Kells.)

A. No, strictly speaking not. As said, the whole arrangement had been made and agreed upon and the instruments were in process of preparation at the time the order was made. The order was for the purpose of approving a plan already decided upon and agreed to.

Cross-int. 10. Was a meeting of the board of directors or trustees of the Pacific Coast & Norway Packing Company held for the purpose of authorizing and acquiescing in the execution and delivery of the instrument conveying the gasoline launch "Bernice" to Schoenwald and Hills as receiver?

A. No.

Cross-int. 11. In what city, state, office or building was said meeting of the board of directors or trustees of said corporation held?

A. Cross-interrogatories 11 to 15, inclusive, assume that such a meeting was held, and the contrary being true, have no application.

(Cross-interrogatories 12, 13, 14 and 15 not read, all referring to No. 10.)

Cross-int. 16. Was a meeting of the stockholders of the Pacific Coast and Norway Packing Company held for the purpose of authorizing and acquiescing in the execution and delivery of the instrument conveying the gasoline launch "Bernice" to Schoenwald and Hills as receivers?

A. No, I think not.

Cross-int. 17. Where was said meeting of the stockholders of said corporation held, giving the city, state, and office or building?

(Deposition of Lucas C. Kells.)

A. Cross-interrogatories 17 to 23, inclusive, assume an affirmative answer to cross-interrogatory 16, and the contrary being the fact, these questions have no application.

(Cross-interrogatories 18, 19, 20, 21, 22 and 23 not read, as they refer to No. 16.) [66]

Cross-int. 24. Did you, as attorney for said Schoenwald and Hills, as receivers, cause to be made and entered the order of the Superior Court of King County, dated on or about October 26, 1914, which order is referred to in cross-interrogatory No. 8? A. Yes, acting for Mr. Smith.

Cross-int. 25. Did you dictate or draw said order of the Superior Court of King County, of October 26, 1914? If you did not, give the name of the person who did. A. Yes.

Cross-int. 26. Has a committee of Alaskan creditors been selected and appointed in Alaska to co-operate with Schoenwald and Hills as receivers?

A. Not to my knowledge.

Cross-int. 27. If you have stated that there has been a committee of Alaskan creditors selected and appointed in Alaska to co-operate with Schoenwald and Hills as receivers, state the names of said Alaskan creditors, who are members of said committee, giving their Alaska address.

(No answer to above interrogatory.)

Cross-int. 28. State the names of the creditors of said Pacific Coast & Norway Packing Company who live in Alaska.

A. Except Mr. McDonald, I do not know their



(Deposition of Lucas C. Kells.)

names.

Cross-int. 29. State the dividend that has been paid to Alaskan creditors by Schoenwald and Hills as receivers, up to and including October 12, 1915.

A. None.

Cross-int. 30. Were Schoenwald and Hills appointed receivers upon a petition of one Roy W. Nevin, in cause No. 103,639, of the Superior Court of King County, State of Washington?

Judge GUNNISON.—We move to strike all except the word “Yes,” as voluntary testimony by the witness, and as not responsive.

The COURT.—It will be stricken.

A. Yes. [67]

Cross-int. 31. Was Roy W. Nevin a creditor of the Pacific Coast & Norway Packing Company at the time of the filing of his petition in Cause No. 103,639 of the Superior Court of King County, State of Washington? A. Yes.

Cross-int. 32. Was a conveyance of the gasoline boat “Bernice” to Schoenwald and Hills as receivers made after Honorable Robert W. Jennings, Judge of the District Court for the First Division of Alaska, had refused to grant the petition of Roy W. Nevin for the appointment of an ancillary receiver of the Pacific Coast & Norway Packing Company in the Territory of Alaska?

A. I do not think Mr. Nevin petitioned in Alaska. The receivers in Washington petitioned there. I understand that the Alaska court heard the petition partially but did not pass upon it. The transfer of

(Deposition of Lucas C. Kells.)

the "Bernice," however, was subsequent to this.

Cross-int. 33. Was Roy W. Nevin a creditor of the Pacific Coast & Norway Packing Company at the time of the filing of his petition in the District Court of Alaska, for the appointment of a receiver for said corporation?

A. He filed no petition in Alaska.

Cross-int. 34. Of what State has E. Schoenwald been a citizen and resident since September 15, 1914? A. Washington.

Cross-int. 35. Of what State has S. T. Hills been a citizen and resident since September 15, 1914?

A. Washington.

Cross-int. 36. Was the Pacific Coast & Norway Packing Company insolvent at the time of the appointment of Schoenwald and Hills as receivers, of such by the Superior Court of King County, State of Washington?

Mr. ROBERTSON.—We move to strike all of the answer to this question [68] except the word "No."

The COURT.—It will be stricken.

A. No.

Cross-int. 37. Was the conveyance to Schoenwald and Hills as receivers, of the gasoline boat "Bernice," as well as the other personal assets in Alaska of the Pacific Coast & Norway Packing Company necessary to the successful conduct of the receivership by said Schoenwald and Hills as receivers?

A. It may not have been absolutely necessary, but after consideration we all agreed that it would

(Deposition of Lucas C. Kells.)

effect considerable economy and efficiency of management.

Cross-int. 38. Are all of your answers to the direct and cross-interrogatories propounded to you in this deposition based upon your personal and actual knowledge? If your answer to this question is in the negative, state which answers are not, indicating by the particular number of each direct and cross-interrogatory to which your answers are not based upon personal and actual knowledge.

A. I was not present at the creditors' meeting and have come very little in contact with the creditors and stockholders. My information as to their attitude has been obtained from discussions of the company's affairs with the receivers, Mr. Smith and the president of the company, with relation to the conduct of its business. Otherwise my answers are from personal knowledge.

Cross-int. 39. Are you an impartial witness in view of the fact that you are one of the attorneys for the plaintiffs in the case in which this deposition is being taken?

A. Yes. I have endeavored to answer with the exact truth in so far as I know it.

Cross-int. 40. Have you dictated or outlined the plan of procedure under which Schoenwald and Hills, as receivers, are acting in endeavoring to obtain control of the assets of the Pacific [69] Coast & Norway Packing Company, which are located in Alaska?

Mr. ROBERTSON.—We ask that all after the

(Deposition of Lucas C. Kells.)

word "No" in the answer be stricken.

The COURT.—It will be stricken.

A. No.

Cross-int. 41. Is it not to your personal interest to have the assets in Alaska of the Pacific Coast & Norway Packing Company administered by the courts of Washington?

A. No, I have no personal interest whatever in the matter.

Judge WINN.—We will now read the deposition of C. O. Steberg.

Mr. ROBERTSON.—We will make the same objection to the testimony of Mr. Steberg as to the receivership as incompetent, irrelevant and immaterial.

The COURT.—The general objection is overruled.

**Deposition of C. O. Steberg.**

Int. 1. State your name, residence and occupation.

A. C. O. Steberg; Buckley, Washington, near Seattle; banker, with other business interests, including that in Pacific Coast & Norway Packing Company.

Int. 2. Are you a stockholder and director of the Pacific Coast & Norway Packing Company?

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial.

The COURT.—Overruled.

A. Yes, and president, as well as a creditor.

Mr. ROBERTSON.—We move to strike all that part of his answer except the word "Yes."

The COURT.—It will be stricken.



(Deposition of C. O. Steberg.)

Int. 3. Were you such stockholder and director prior to, and at the time of, the appointment of E. Schoenwald and S. T. Hills as receivers of said company?

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial.

The COURT.—Overruled. [70]

A. Yes, for years before.

Int. 4. State whether, if you know, the assets of the Pacific Coast & Norway Packing Company, including its assets in Alaska, were at once turned over to said receivers upon their appointment and qualification.

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial, not the best evidence, calls for a conclusion of the witness, and it seems to me it calls for hearsay.

The COURT.—Objection overruled.

A. They were.

Int. 5. Please state whether or not you are familiar with and have personal knowledge of the reasons why receivers were appointed for said Pacific Coast & Norway Packing Company. A. Yes.

Int. 6. If so, state such reasons in full.

Mr. ROBERTSON.—Now, we object to that as incompetent, irrelevant and immaterial.

The COURT.—Overruled.

Mr. ROBERTSON.—We object to the answer as incompetent, irrelevant and immaterial, not responsive to the question; it is a conclusion of the witness, and is not the best evidence.

(Deposition of C. O. Steberg.)

The COURT.—Objection overruled.

A. Various unlooked for difficulties prevented the company paying its debts as they fell due. It had plenty of assets, but couldn't realize. Some were tied up by garnishment. Particularly there was a story passed around that the company had a lot of poor fish, and this made us trouble. We wanted to protect the creditors and get the company in shape again, and so a friendly suit was started and receivers appointed.

Int. 7. Were any other receivers appointed for said corporation?

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial, and not the best evidence.

The COURT.—Objection overruled. [71]

A. None except Schoenwald and Hills.

Int. 8. State, if you know, what disposition was made of the assets of the Pacific Coast & Norway Packing Company, and expressly as to the assets of the said company located in Alaska, including the gasoline boat "Bernice."

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial, not the best evidence, there are two questions in one, and it calls for a conclusion of the witness.

The COURT.—Objection overruled.

Judge GUNNISON.—We move to strike the answer as not responsive, commencing with the words "Then a deed and bill of sale" in the second line of the answer.

(Deposition of C. O. Steberg.)

The COURT.—Motion denied.

A. Turned over at once to Schoenwald as receiver, including the Alaska assets. Then a deed and bill of sale of the Alaska properties were made. The “Bernice” was included.

Int. 9. If you have stated in answer to the last question, that the assets of said company were transferred to E. Schoenwald as receiver, or to Schoenwald and Hills as receivers, state the purpose of such transfer, and whether the same was with the acquiescence and ratification of the board of directors, and stockholders, of said Pacific Coast & Norway Packing Company. Answer fully.

Mr. ROBERTSON.—We object to that, if the Court please, as incompetent, irrelevant and immaterial, not the best evidence.

The COURT.—Objection overruled.

A. The purpose of the transfer was to make the handling of the properties as simple, cheap and effective as possible for the protection of all the creditors alike. Yes, everybody desired this and approved of transferring the Alaska assets to the receivers. All the directors approved of this, and so far as my knowledge went all the stockholders did. I personally know that a large majority of the stockholders did. [72]

Judge GUNNISON.—I think our objection to that in the first place was it wasn't responsive. I would like to object to the last three sentences of that answer, beginning with the word “Yes,” and going to the end of the answer, as immaterial, irrelevant,

(Deposition of C. O. Steberg.)

and not proving or attempting to prove any action on the part of the corporation; and I would like to have the record show our objection.

The COURT.—Very well, the record will so show, and the objection will be overruled.

Int. 10. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in the cause? If yes, set forth the same fully and at large in your answer.

A. I don't think of anything more.

Cross-interrogatories.

Cross-int. 1. State what Court appointed E. Schoenwald and S. T. Hills receivers of the Pacific Coast & Norway Packing Company.

A. Superior Court at Seattle.

Cross-int. 2. Has any court in the Territory of Alaska ever appointed Schoenwald and Hills, or either of them, receivers for the Pacific Coast & Norway Packing Company? A. I believe not.

Cross-int. 3. Was the gasoline boat "Bernice" at any time in the State of Washington during the period between September 15, 1914, and February 8, 1915? A. I think not.

Cross-int. 4. Was Roy W. Nevin a creditor of the Pacific Coast & Norway Packing Company at the time of filing his petition in the Superior Court of King County, State of Washington, [73] in cause No. 103,639, for the appointment of receivers of said



(Deposition of C. O. Steberg.)

corporation?      A. I so understood.

Cross-Int. 5. How much of a dividend has been paid to the creditors of the Pacific Coast & Norway Packing Company by Schoenwald and Hills as receivers of said corporation, since their appointment?

A. None.

Cross-int. 6. Was a meeting of the Board of Directors or Trustees of the Pacific Coast & Norway Packing Company held for the purpose of authorizing and acquiescing in the execution and delivery of the instrument conveying the gasoline launch "Bernice" to Schoenwald and Hills as receivers?

A. No, there has been no meeting of the board since before the receivership.

Cross-int. 7. In what city, state, office or building was said meeting of the board of directors or trustees of said corporation held?

(No answer and cross-interrogatories Nos. 8, 9, 10, not read, as they refer to No. 6.)

Cross-int. 11. How many trustees or directors constituted the board of directors or trustees of said corporation on the date of their said meeting to which you referred in your answer to cross-interrogatory No. 6?

A. Seven was the entire board. I think there was one vacancy at that time.

Cross-int. 12. Was a meeting of the stockholders of the Pacific Coast & Norway Packing Company held for the purpose of authorizing and acquiescing in the execution and delivery of the instrument conveying the gasoline launch "Bernice" to Schoen-

(Deposition of C. O. Steberg.)

wald and Hills as receivers? A. No.

(Cross-interrogatories Nos. 13, 14, 15, 16, 17, 18, and 19, [74] not read, as they refer to cross-interrogatory No. 12.)

Cross-int. 20. Please state the total amount of capital stock outstanding on the date of said meeting.

A. Somewhere between \$300,000 and \$400,000. I don't remember the exact amount.

Cross-int. 21. Of what state have E. Schoenwald and S. T. Hills been residents since September 15, 1914, giving the state of residence of each?

A. Both residents of Washington.

Cross-int. 22. Was said conveyance or bill of sale to E. Schoenwald and S. T. Hills, as receivers, of the gasoline boat "Bernice" made pursuant to an order dated October 26, 1914, made by the Superior Court of King County, of the State of Washington?

A. The order and transfer were made at the same time. We asked the Court to approve the receivers, taking over the Alaska properties, because this was in all ways a good thing and to the advantage of all interested.

Cross-int. 23. Was said conveyance or bill of sale of the gasoline boat "Bernice" to Schoenwald and Hills as receivers necessary to the successful conduct of the receivership by those gentlemen?

A. Probably not necessary but very helpful and important.

Cross-int. 24. Has a committee of Alaskan creditors been selected and appointed in Alaska to co-

(Deposition of C. O. Steberg.)

operate with Schoenwald and Hills as receivers?

Mr. ROBERTSON.—We move to strike, as not responsive, all after the word “No,” in the answer.

The COURT.—It will be stricken.

A. No.

Cross-int. 25. If you have stated that there has been a committee of Alaskan creditors selected and appointed in Alaska to co-operate with Schoenwald and Hills as receivers, state the [75] names of said Alaskan creditors, who are members of said committee, giving their Alaskan address.

Mr. ROBERTSON.—We move to strike all of the 25th answer, except the words “I have answered this.”

The COURT.—Motion denied.

A. I have answered this. There is no Alaska creditors on the committee the creditors in Alaska are few and small. McDonald is the only creditor of any size, except the bank of Petersburg. Officers of the bank were consulted and approved everything that was done.

Cross-int. 26. State the names of the creditors of said Pacific Coast & Norway Packing Company who live in Alaska.

Mr. ROBERTSON.—We move to strike the answer to this question as not responsive.

The COURT.—All may be stricken after the word “them.”

A. I haven't any list of them.

Cross-int. 27. State the dividend that has been paid to Alaskan creditors by Schoenwald and Hills as

(Deposition of C. O. Steberg.)

receivers, up to and including October 12, 1915.

A. No dividend has been paid creditors.

Cross-int. 28. Were Schoenwald and Hills appointed receivers upon a petition of one Roy W. Nevin, in cause No. 103,639 of the Superior Court of King County, state of Washington?

Mr. ROBERTSON.—I move to strike the answer to this question, as not responsive.

The COURT.—The entire answer may be stricken.  
(Answer not read.)

Cross-int. 29. Was a conveyance of the gasoline boat "Bernice" to Schoenwald and Hills, as receivers made after Honorable Robert W. Jennings, Judge of the District Court for the First Division of Alaska, had refused to grant the petition of Roy W. Nevin, for the appointment of an ancillary receiver [76] of the Pacific Coast & Norway Packing Company in the Territory of Alaska?

A. So far as I know, there wasn't any such petition nor refusal.

Cross-int. 30. Was Roy W. Nevin a creditor of the Pacific Coast & Norway Packing Company at the time of the filing of his petition in the District Court of Alaska, for the appointment of a receiver for said corporation?

A. I don't think he filed any petition in Alaska. He continued to be a creditor.

Cross-int. 31. Was the Pacific Coast & Norway Packing Company insolvent at the time of the appointment of Schoenwald and Hills as receivers, of



(Deposition of C. O. Steberg.)

such, by the Superior Court of King County, State of Washington?

A. It was not in shape to meet some of its bills, as these fell due, but its assets were regarded as largely in excess of its debts.

Cross-int. 32. Are all of your answers to the direct and cross-interrogatories propounded to you in this deposition based upon your personal and actual knowledge? If your answer to this question is in the negative, state which answers are not, indicating by the particular number of each direct and cross-interrogatory to which your answers are not based upon personal and actual knowledge.

A. Yes, except where otherwise shown in the answers.

(Whereupon court adjourned until 10 o'clock tomorrow morning.)

### MORNING SESSION.

December 21, 1915, 10 A. M.

The COURT.—In the matter of the deposition of Mr. Smith, the objections to the questions are all overruled. The objections to the answers are virtually all granted. The parts of the answers not read are stricken; and the plaintiffs are allowed an exception.

(The defendants filed with the clerk of the court objections to questions and answers; the objections to the questions appear in the deposition following; the objections to the answers appear following the answers containing the stricken portions, page 48.

(Deposition of Winfield R. Smith.)

Whereupon said deposition was read as follows:)

[77]

Int. 1. Please state your name, residence and occupation.

A. My name is Winfield R. Smith; I reside at the Sorrento Hotel, Seattle, Washington, and am an attorney.

Int. 2. State whether you are attorney for the above-named E. Schoenwald and S. T. Hills as receivers of the Pacific Coast & Norway Packing Company, and if so, how long you have been such attorney.

Mr. ROBERTSON.—We object to that as multifarious, incompetent, irrelevant and immaterial, and not the best evidence.

A. I have been attorney for the receivers since their appointments.

Int. 3. State whether you were attorney for said Pacific Coast & Norway Packing Company prior to being attorney for the receivers, how long you continued as attorney for such corporation, and what, if any, part you took as such attorney for said corporation in the suit brought against it for the appointment of receivers, and in which such receivers were appointed.

Mr. ROBERTSON.—Same objection.

A. I was not regularly the attorney for the company, but acted for them in some matters. I appeared for them in the receivership suit of Nevin vs. the Company, until the receivers were appointed, then I withdrew.

(Deposition of Winfield R. Smith.)

Int. 4. State whether the said corporation has since employed any other attorney in the receivership matters.

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial.

A. Not so far as I know.

Int. 5. Please state whether or not you are familiar with and have personal knowledge of the reasons why receivers were appointed for said Pacific Coast & Norway Packing Company.

Mr. ROBERTSON.—We object to that as calling for a conclusion of the witness, is incompetent, irrelevant, immaterial, calls for a conclusion of law, and not the best evidence. [78]

A. I am and have.

Int. 6. If so, state such reasons in full.

Mr. ROBERTSON.—Same objection as to previous question.

A. For a combination of reasons the company found itself unable to pay its debts as they matured in ordinary course of business. A few poor fish, exaggerated reports, large shipments held up, suit of Duff, garnishment, etc. Believed then the company's assets far exceeded liabilities and could work out. Purpose of receivership was to conserve the assets and enable the company to get on its feet and pay debts at the earliest possible time.

Int. 7. Were any other receivers appointed for said corporation?

Mr. ROBERTSON.—That is objected to as immaterial. A. No.

(Deposition of Winfield R. Smith.)

Int. 8. State, if you know, what disposition was made of the property, real and personal, of the Pacific Coast & Norway Packing Company upon the appointment and qualification of Mr. Schoenwald as receiver, and state expressly as to the property and assets located in Alaska, including the gasoline boat "Bernice." What further, if anything, was done with such property and assets upon the appointment and qualification of Mr. Hills as coreceiver?

Mr. ROBERTSON.—Object to that as incompetent, irrelevant and immaterial, multifarious and not the best evidence.

A. All the property was immediately turned over to the receiver.

Int. 9. State whether the said receivers have been conducting the business of the said Pacific Coast & Norway Packing Company in Alaska, and if so, when they, or Mr. Schoenwald, began to do so.

Mr. ROBERTSON.—Same objection as to the foregoing question.

A. Yes, from the moment Schoenwald was appointed and qualified as receiver. Transfer of possession and control was made on telegraphic arrangement by the company. [79]

Int. 10. State whether the real and personal property belonging to said corporation in the territory of Alaska, including the said gasoline boat "Bernice," was transferred by written instruments delivered to the receivers; and if so, when, and attach hereto the said writing or writings, marking them appropriately as exhibits constituting a part of



(Deposition of Winfield R. Smith.)

your answer to this question.

Mr. ROBERTSON.—We object to that as calling for a conclusion of law, not the best evidence, multifarious, incompetent, irrelevant and immaterial, and a conclusion of the witness.

A. Yes; real estate by deed; personal property by bill of sale, expressly including the “Bernice.” The original writings are hereto attached, and marked respectively exhibits “A” and “B.”

Int. 11. State, if you know, what was the occasion for the execution of these instruments, and whether they were executed and delivered voluntarily by the Pacific Coast & Norway Packing Company.

Mr. ROBERTSON.—Same objection as to previous question.

A. The occasion for the execution of these instruments was to further protect all the creditors alike, and avoid the expense and occasion of appointing ancillary receivers in Alaska. Every officer and every director desired it. One director, the deposed manager, who was in consequence hostile to the company, had been opposed to any receivership, but as soon as receivers were appointed he favored with the rest having them hold and conduct all of the assets of the business, unifying control.

Int. 12. What, if anything, did you have to do with the execution and delivery of said instruments, and state fully the circumstances and conditions surrounding and leading up to their execution.

Mr. ROBERTSON.—We object to that as incom-

(Deposition of Winfield R. Smith.)

petent, irrelevant and immaterial, and multifarious.

[80]

A. It was agreed between the receivers and the company informally, subject to the approval of the court at Seattle, that instead of going farther with Alaska receivers the company should make an immediate conveyance of its Alaska assets to the Washington receivers, who already were in possession of these assets, and operating in Alaska, as stated above. I was at Juneau at the time. It was necessary to dispose of the question of the Alaska assets definitely one way or another without further delay. I therefore covered the matter as well by cable as I could. Naturally we wished the Court's approval of the receivers' taking conveyance of the legal title of these assets, and also we desired the Court to know that the company was favorable to the transfer of the assets. Therefore it was arranged that the receivers and my law assistant, acting for me, should go before the Court the next day at Seattle, along with the president of the company, and the matter of a voluntary transfer be submitted to the Court and approved by him. This was accordingly done. The Court particularly assured himself that the company favored and desired to make such transfer, and thereupon he sanctioned the conveyance to the receivers. As soon as this was done, the bill of sale and deed were immediately executed.

Int. 13. State whether or not, if you know, the trustees and stockholders of the Pacific Coast & Nor-

(Deposition of Winfield R. Smith.)

way Packing Company authorized or acquiesced in the execution and delivery of said instruments.

Mr. ROBERTSON.—We object to that as not the best evidence, calls for a conclusion, incompetent, irrelevant and immaterial.

A. Every trustee, and I believe every stockholder, certainly the vast majority of the stockholders, approved the execution of these instruments transferring the legal title of the Alaska assets to the receivers. [81]

Int. 14. State fully whether or not, if you know, the Superior Court of King County, being the court of the receivership, compelled the execution and delivery of the said instruments, or whether the same were executed voluntarily by the said Pacific Coast & Norway Packing Company without compulsion.

Mr. ROBERTSON.—We object to that as calling for a conclusion both of law and of fact, not the best evidence, incompetent, irrelevant and immaterial.

A. There was no thought of compelling the company to execute the instruments of transfer. The Court not only did not attempt to do this, but explicitly rested its order upon the acquiescence and consent of the company.

Int. 15. If the said Court did enter any order in the premises, please so state; and attach a certified copy of said order as a part of your answer to this question.

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial.

A. The Court did enter an order, and I hereto at-

(Deposition of Winfield R. Smith.)

tach a certified copy of that order, marked exhibit "C."

Int. 16. State, if you know, why and under what circumstances the said order was entered, and why the said written transfers were ordered, executed and delivered.

Mr. ROBERTSON.—We object to that as not the best evidence, multifarious, incompetent, irrelevant and immaterial, and calling for a conclusion of law.

A. I have already fully answered this question.

Int. 17. State whether there has been any active co-operation throughout the receivership, between the receivers and creditors of Pacific Coast & Norway Packing Company; and if so, state by and through whom the said creditors actively co-operated with said receivers.

Mr. ROBERTSON.—We object to that as incompetent, irrelevant, immaterial, not the best evidence, calls for a conclusion, and is multifarious. [82]

A. Yes.

Int. 18. If you have mentioned a creditors' committee, state when such committee was selected, how and by whom, of whom it consists, and why these persons were selected, if you know.

Mr. ROBERTSON.—Same objection as to previous question.

A. I have already answered this in part. The committee was selected at the time the creditors met in Seattle, I think on September 22, 1914. The four representatives were, Mr. Lewis Pattullo, A. J. Speckert, E. Morganstern and John McLean. As



(Deposition of Winfield R. Smith.)

stated, they were selected because they represented the four largest unsecured creditors, who therefore had most at stake in a successful administration and outcome.

Int. 19. State, if you know, what at that time was, and since has been, the attitude of the creditors of Pacific Coast & Norway Packing Company towards the assets in Alaska, and especially towards the immediate delivery of the said assets to the receivers upon their appointment, and the retention of such assets since by the receivers, and towards the written transfers of the said assets hereinabove mentioned and set forth.

Mr. ROBERTSON.—Same objection as to interrogatory No. 17.

A. I have already answered this in part. The creditors' committee, and so far as we know, all of the creditors except McDonald, favored the transfer of the title to these Alaska assets to the Washington receivers. Getting the entire management into the hands of one set of receivers was expressly favored by the creditors' committee, and the transfers of the title to them were expressly approved by the committee.

Int. 20. State whether the conveyance of the assets of said Pacific Coast & Norway Packing Company unto said receivers, including the gasoline boat "Bernice," was made under and by virtue of any Washington statute or under compulsion of law, [83] or whether the deeds of conveyance were intended common law deeds. Answer fully.

(Deposition of Winfield R. Smith.)

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial, not the best evidence, calls for both a conclusion of law and of fact.

A. The deed and the bill of sale to the receivers covering the Alaska assets of the company were made wholly voluntarily. There are statutes in the State of Washington providing for involuntary transfers, but these statutes did not enter into this matter at all. There was no occasion or thought of an involuntary or compelled transfer of these assets.

Int. 21. Do you know, or can you set forth, any other matter or thing which may be of a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in the cause? If yes, set forth the same fully and at large in your answer.

Mr. ROBERTSON.—We object to that as being too general.

A. I think of nothing further in answer to these interrogatories, except that the “Bernice” is of eleven tons burden only. The “Bernice” was in the possession and control of the receivers from the day of their appointment. The bill of sale was delivered immediately upon its execution.

#### Cross-interrogatories.

Cross-int. 1. In what court and in what State were E. Schoenwald and S. T. Hills appointed receivers for the Pacific Coast & Norway Packing Company?

(Deposition of Winfield R. Smith.)

A. Superior Court of King County, Washington.

Cross-int. 2. Was the gasoline boat "Bernice" in the State of Washington at any time during the period from September 15, 1914, to April 28, 1915?

A. No. [84]

Cross-int. 3. Was the gasoline boat "Bernice" at all times within the jurisdiction of the District Court of the First Division of the Territory of Alaska, during the period from September 15, 1914, to April 28, 1915? If your answer is in the negative, state the periods of time, giving dates, that said boat was outside the jurisdiction of said court.

A. It was at all times in Alaska, centering in Petersburg.

Cross-int. 4. Was the gasoline boat "Bernice," during the period from September 15, 1914, to February 8, 1915, licensed under documents issued by the officials of the United States Customs District for Alaska?      A. I am not certain.

Cross-int. 5. Was any bill of sale or other document conveying the gasoline boat "Bernice" from the Pacific Coast & Norway Packing Company to E. Schoenwald and S. T. Hills, as receivers, or to either of them as receivers, filed for record or recorded with the United States Customs officials for the Customs District of Alaska, at any time prior to February 10, 1915? If your answer is in the affirmative, state the date that said bill of sale or other document was recorded with said officials.

A. No; neither before February 10, 1915, nor after.

Cross-int. 6. Have E. Schoenwald and S. T. Hills,

(Deposition of Winfield R. Smith.)

or either of them, ever been appointed receivers of the Pacific Coast & Norway Packing Company, by any court of the District or Territory of Alaska?

A. No; the Alaska court has appointed no receivers.

Cross-int. 7. Was the conveyance or transfer of the gasoline boat "Bernice" to Schoenwald and Hills, or to either of them, made prior to the appointment of those gentlemen as receivers by the Superior Court of King County, State of Washington?

A. No.

Cross-int. 8. Did Honorable Everett Smith, Judge of the Superior [85] Court of King County, for the State of Washington, on or about October 26, 1914, make an order directing that the Pacific Coast & Norway Packing Company transfer all of its personal assets in Alaska to Schoenwald and Hills, as receivers? A. Yes.

Cross-int. 9. Was the bill of sale or conveyance of the gasoline boat "Bernice" to Schoenwald and Hills as receivers, made in pursuance to the order of the Superior Court of King County, entered by that court on or about October 26, 1914?

A. I have already fully explained this in my direct examination.

Cross-int. 10. Was a meeting of the board of directors or trustees of the Pacific Coast & Norway Packing Company held for the purpose of authorizing and acquiescing in the execution and delivery of the instrument conveying the gasoline launch "Bernice" to Schoenwald and Hills as receivers?



(Deposition of Winfield R. Smith.)

A. No, there has been no formal meeting of the board of trustees held since the receivers were appointed.

(Cross-interrogatories 11, 12, 13, 14 and 15 not read, as they refer to cross-interrogatory No. 10, and no meeting was held.)

Cross-int. 16. Was a meeting of the stockholders of the Pacific Coast & Norway Packing Company held for the purpose of authorizing and acquiescing in the execution and delivery of the instrument conveying the gasoline launch "Bernice" to Schoenwald and Hills as receivers?

A. No formal meeting of the stockholders has been held since the last annual meeting prior to the receivership.

(Cross-interrogatories Nos. 17, 18, 19, 20, 21, 22 and 23 not read, as they refer to the holding of a meeting, which was not held.)

Cross-int. 24. Did you, as attorney for said Schoenwald and Hills, as receivers, cause to be made and entered the order of the Superior Court of King County, dated on or about October 26, [86] 1914, which order is referred to in cross-interrogatory No. 8?

A. I have fully answered this in my direct examination.

Cross-int. 25. Did you dictate or draw said order of the Superior Court of King County, of October 26, 1914? If you did not, give the name of the person who did.

(Deposition of Winfield R. Smith.)

A. No, I believe it was drawn by Mr. Lucas C. Kells in my office.

Cross-int. 26. Has a committee of Alaskan creditors been selected and appointed in Alaska to co-operate with Schoenwald and Hills as receivers?

A. No.

Cross-int. 27. If you have stated that there has been a committee of Alaskan creditors selected and appointed in Alaska to co-operate with Schoenwald and Hills as receivers, state the names of said Alaskan creditors, who are members of said committee, giving their Alaska address.

(No answer to above question.)

Cross-int. 28. State the names of the creditors of said Pacific Coast & Norway Packing Company who live in Alaska.

A. I do not recall the names of all the creditors there. They are relatively few and the claims small.

Cross-int. 29. State the dividend that has been paid to Alaskan creditors by Schoenwald and Hills, as receivers, up to and including October 12, 1915.

A. No dividend has been paid by the receivers.

Cross-int. 30. Were Schoenwald and Hills appointed receivers upon a petition of one Roy W. Nevin, in cause No. 103,639 of the Superior Court of King County, state of Washington?

A. The receivers were appointed on the suit of Roy W. Nevin, cause No. 103,639, in the Superior Court of King County, Washington.

Cross-int. 31. Was Roy W. Nevin a creditor of the Pacific Coast & Norway Packing Company at

(Deposition of Winfield R. Smith.)

the time of the filing of his petition in cause No. 103,639 of the Superior Court of King [87] County, State of Washington? A. Yes.

Cross-int. 32. Was a conveyance of the gasoline boat "Bernice" to Schoenwald and Hills, as receivers, made after Honorable Robert W. Jennings, Judge of the District Court for the First Division of Alaska, had refused to grant the petition of Roy W. Nevin for the appointment of an ancillary receiver of the Pacific Coast & Norway Packing Company in the Territory of Alaska?

A. Nevin never petitioned for the appointment of ancillary receivers in Alaska. The receivers petitioned for the extension of the receivership over Alaska, but no disposition was ever made of this petition, as I have explained in my direct examination.

Cross-int. 33. Was Roy W. Nevin a creditor of the Pacific Coast & Norway Packing Company—at the time of the filing of his petition in the District Court of Alaska; for the appointment of a receiver for said corporation?

(No answer to the above question.)

Cross-int. 34. Of what state has E. Schoenwald been a citizen and resident since September 15, 1914?

A. State of Washington.

Cross-int. 35. Of what state has S. T. Hills been a citizen and resident since September 15, 1914?

A. State of Washington.

Cross-int. 36. Was the Pacific Coast & Norway Packing Company insolvent at the time of the appointment of Schoenwald and Hills as receivers, of

(Deposition of Winfield R. Smith.)

such, by the Superior Court of King County, state of Washington?

A. The assets of the Pacific Coast & Norway Packing Company were valued in a sum considerably in excess of its liabilities at the time of the appointment of the receivers. [88]

Cross-int. 37. Was the conveyance to Schoenwald and Hills as receivers of the gasoline boat "Bernice," as well as the other personal assets in Alaska of the Pacific Coast & Norway Packing Company, necessary to the successful conduct of the receivership by said Schoenwald and Hills, as receivers?

A. Transfer of the assets of Alaska to the receivers made for the sake of efficient, economical, unified administration, to the benefit of all the creditors alike.

Cross-int. 38. Are all of your answers to the direct and cross-interrogatories propounded to you in this deposition based upon your personal and actual knowledge? If your answer to this question is in the negative, state which answers are not, indicating by the particular number of each direct and cross-interrogatory to which your answers are not based upon personal and actual knowledge.

A. Speaking broadly my answers are based upon personal and actual knowledge. So far as this is not the case, it appears in the answers themselves.

Cross-int. 39. Are you an impartial witness in view of the fact that you are one of the attorneys for the plaintiff in the case in which this deposition is being taken?



(Deposition of Winfield R. Smith.)

A. My only interest or concern is as an attorney and as myself a general creditor for approaching \$700 of Pacific Coast & Norway Packing Company. I have no other interest or concern whatever, and my connection does not affect my testimony in the least.

Cross-int. 40. Have you dictated or outlined the plan of procedure under which Schoenwald and Hills, as receivers, are acting in endeavoring to obtain control of the assets of the Pacific Coast & Norway Packing Company, which are located in Alaska?

(Answer stricken as not being responsive.)

Cross-int. 41. It is not to your personal interest to have the assets in Alaska of the Pacific Coast & Norway Packing Company [89] administered by the Courts of Washington?

A. I have no private personal interest in the matters of the receivership. As a creditor of the company and as attorney for the receivers I am very desirous to see the matters administered in the best and most efficient way for the benefit of all creditors alike, and a very important element to this end is to have all the assets and operations of the company held and administered as a unit, as stated.

Judge WINN.—Now, if the Court please, we offer in evidence the exhibits which are identified in the answer of Mr. Smith to the 10th interrogatory—that is, the deed which conveys the real estate, and the bill of sale which purports to convey the personal property, and are referred to in Mr. Smith's answer to the tenth interrogatory as exhibits "A" and "B."

Judge GUNNISON.—We object to the admission

(Deposition of Winfield R. Smith.)

of the instrument offered as exhibit "A" connected with the deposition, on the ground that it is incompetent, irrelevant and immaterial; that it purports to be the action of a corporation—there is no evidence that the corporation itself has executed it, or authorized its execution, the testimony of the witness being to the effect that certain of the directors and certain of the stockholders desired these various matters to be done. This document has no reference whatever to the subject matter of the controversy, and it is immaterial and irrelevant.

As to the exhibit "B" tendered by the plaintiffs, we object to it on the ground that it is not properly executed by the corporation, being signed only by the Pacific Coast & Norway Packing Company, by C. O. Steberg, its President, and there is what purports to be a corporate seal,—there is nothing to indicate that it is the seal of the corporation. The instrument is without consideration, and there is nothing to indicate that the corporation authorized the execution of it. [90] We think it is incompetent because of its imperfect execution; we think it is immaterial because there is no record of its ever having been recorded anywhere. So far as this case is concerned, that deed from the company—even if it were properly executed—to Schoenwald and Hills, without a record somewhere in some office in this Territory of which the defendant is a resident, could not be notice to the defendant—therefore we think it is immaterial and incompetent.

The COURT.—Objection overruled.

(Whereupon said deed and bill of sale were received in evidence, and marked, respectively, Plaintiffs' Exhibit "J" and "K.")

Judge WINN.—Now, in answer to the 15th interrogatory Mr. Smith identifies the court order that was made in ratification of the action of the corporation in deeding over this property under those two instruments which have just been received in evidence, and is identified in his answer as exhibit "C." We now offer that order.

Judge GUNNISON.—We object to it as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

Judge GUNNISON.—That order is not binding on the defendant, was not brought to the attention of the defendant, and is immaterial.

The COURT.—Objection **overruled**.

(Whereupon said order was received in evidence and marked Plaintiffs' Exhibit "L.")

Judge WINN.—Will you admit, Judge Gunnison, there was a demand made upon the United States Marshal for the return of the gasoline boat "Bernice"?

Mr. ROBERTSON.—Demand made by Schoenwald and Hills, as receivers, in the capacity in which this suit was brought?

Judge WINN.—A demand made on the Marshal to turn over the gasoline [91] boat "Bernice"—demand made by us as attorneys for the plaintiffs in this suit?

Judge GUNNISON.—We will admit that.

(Deposition of Lucas C. Kells.)

Judge WINN.—We offer in evidence, may it please the Court, the entire deposition of the witness Winfield R. Smith.

Judge GUNNISON.—We object to that as incompetent, irrelevant and immaterial except as to the portions that have been read to the jury.

The COURT.—Very well, the record may show that you offered it.

Judge WINN.—We now offer in evidence the deposition of the witness C. O. Steberg.

The COURT.—The record may also show that you offered that.

Judge WINN.—We also offer the deposition of the witness L. C. Kells.

The COURT.—The record may show that you offered it.

(Whereupon a recess was had for 10 minutes.)

The foregoing are the depositions of L. C. Kells, C. O. Steberg and Winfield R. Smith, excepting only those portions thereof which were stricken by the Court, and plaintiffs allowed an exception. The answers, in which is contained the portion so stricken, are as follows,—the stricken portions appearing in parentheses.

### **Deposition of L. C. Kells.**

Ans. to the 13th direct interrogatory. I prepared the instruments and they were executed and delivered in my presence. The officers, principal stockholders and creditors concurred in wishing to have the control of all the company's affairs in the hands of the company's receivers at Seattle, where its principal



(Deposition of Lucas C. Kells.)

office has always been, and where its business interests were centered. (It was considered that it would be much more economical and harmonious if the company's management was unified in their hands. It was contemplated [92] that this could be accomplished either by having the Washington receivers made ancillary receivers in Alaska or by transferring legal title to the Alaska assets to the receivers by a common law transfer. When it was found that the receivers in Washington probably could not be made sole ancillary receivers in Alaska, it was decided to adopt the other alternative. Mr. Smith cabled directions to me as to preparing the instruments, having them executed and getting the Court's approval. I got Mr. Schoenwald and Mr. Steberg, the president of the company, in the office. I acquainted them with the contents of Mr. Smith's cable, dictated the deed and bill of sale and the order of court sanctioning the arrangement. While the instruments were being prepared we three went together before the court with the order. I acquainted the judge with the contents of Mr. Smith's cable, which he read, and explained the purpose of the transfer, telling the Court that all interested parties were agreeable to the plan. The judge then asked Mr. Steberg whether the company desired to make the transfer. Mr. Steberg answered in the affirmative. The Court then asked Mr. Schoenwald if the receivers favored this plan and he assented. The Court then signed the order.)

Ans. to direct interrogatory No. 19. (The cred-

(Deposition of Lucas C. Kells.)

itors have approved all the measures taken.)

Ans. to direct interrogatory No. 21. (As the "Bernice" was neither registered nor enrolled, weighing only eleven tons, no record was made of the bill of sale in the customs office. Upon inquiry and investigation of the law I understood that according to the rules and regulations of the customs office a license would only be issued to the record owner. However, there is nothing whatever in this regulation providing that failure to record shall affect the title. The only provision in this respect that I have been able to find is section 4192 [93] of the Revised Stats., 7 Fed. Stat. Ann., p. 42, which requires a record to be made of the transfer of registered or enrolled vessels, and decisions under this section hold that even this is not necessary to protect one's title as against those having notice of the transfer or who have not actually acted in reliance upon the record title.)

Ans. to cross-interrogatory No. 30. Yes, (and the company and creditors concurred in the petition.)

Ans. to cross-interrogatory No. 36. No. (the Court found that its assets exceeded its liabilities but appointed the receivers upon the statutory grounds that its property was in danger of being lost or materially impaired in value, and that it was in immediate danger of insolvency.)

Ans. to cross-interrogatory No. 40. No, (I have not done so but often consulted with Mr. Smith and Mr. Schoenwald and the other interested parties concerning the matter.)

**Deposition of C. O. Steberg.**

Ans. to cross-interrogatory No. 24. No, (there has been one general committee of all the creditors, being one person for each of the four largest unsecured creditors.)

Ans. to cross-interrogatory No. 26. I haven't any list of them (but the other Alaska creditors were few and small.)

Ans. to cross-interrogatory No. 28. (Schoenwald was appointed first and then Hills a little later, after a large meeting of creditors.)

**Deposition of Winfield R. Smith.**

Ans. to direct interrogatory No. 8. All the property was immediately turned over to the receiver, (that in Washington under the court order, that in Alaska voluntarily. When the appointment of Mr. Hills as coreceiver was asked by the creditors and the company, Mr. Hills stepped into the same [94] position as Mr. Schoenwald.)

Ans. to direct interrogatory No. 10. Yes, (subsequently legal title was transferred to the receivers.) Real estate by deed; personal property by bill of sale, expressly including the "Bernice." The original writings are hereto attached, and marked respectively Exhibits "A" and "B."

Ans. to direct interrogatory No. 11. The occasion for the execution of these instruments was to further protect all the creditors alike and avoid the expense and occasion of appointing ancillary receivers in Alaska. (The company and the creditors were alike satisfied with the receivership and the receivers. The

(Deposition of Winfield R. Smith.)

important thing then was to have one single administration of all the assets in the business with as little expense and multiplication of court machinery as possible. Virtually the affairs of the company had always been conducted at Seattle, practically as much so as though its cannery and fishing operations had been located at Seattle. The principal office was always here. The policy of the company was determined here and the officers and five out of seven directors lived in or near Seattle. The board held its meetings here. The vast majority of the creditors in numbers and amount were Seattle creditors or eastern creditors from whom purchases were made at Seattle. All of the purchasing was done here except the minor matters that had to be bought at Petersburg. There were few Alaska creditors. Its output was all marketed at or from Seattle. The transfer of the Alaska assets to the receivers was made entirely voluntarily by the company.) Every officer and every director desired it. One director, the deposed manager, who was in consequence hostile to the company, had been opposed to any receivership, but as soon as receivers were appointed he favored with the rest having them hold and conduct all of the assets of the business, unifying control. [95]

Ans. to direct interrogatory No. 12. (The company, its officers, directors, stockholders and creditors, all of whom, unless an insignificant minority of the creditors—including Mr. McDonald in Alaska who was sore at the company—desired to get all of the assets into the control of one set of receivers as



(Deposition of Winfield R. Smith.)

quickly and as simply as possible. To this end the receivers made application in the District Court of Alaska at Juneau to extend their receivership over the Alaska assets. Then it appeared that this might mean the appointment of one resident of Alaska as a receiver, which would in this instance complicate the administration and increase the expense; also technical questions of proper procedure under the jurisdiction of the Alaska court arose. It also appearing that there were very few Alaska creditors, who it seemed, like all the creditors in other jurisdictions, were favorable to a single administration centering in Seattle as the natural and really necessary place.) It was agreed between the receivers and the company informally, subject to the approval of the court at Seattle, that instead of going farther with Alaska receivers the company should make an immediate conveyance of its Alaska assets to the Washington receivers, who already were in possession of these assets, and operating in Alaska, as stated above. I was at Juneau at the time. It was necessary to dispose of the question of the Alaska assets definitely one way or another without further delay. I therefore covered the matter as well by cable as I could. Naturally we wished the Court's approval of the receivers' taking conveyance of the legal title of these assets, and also we desired the Court to know that the company was favorable to the transfer of the assets. Therefore it was arranged that the receivers and my law assistant, acting for me, should go before the Court the next day at Seattle, along

(Deposition of Winfield R. Smith.)

with the president of the company, and the matter of a voluntary transfer [96] be submitted to the Court and approved by him. This was accordingly done. The Court particularly assured himself that the company favored and desired to make such transfer, and thereupon he sanctioned the conveyance to the receivers. As soon as this was done, the bill of sale and deed were immediately executed.

Ans. to direct interrogatory No. 14. (I have already largely answered this in my answer to 12.) There was no thought of compelling the company to execute the instruments of transfer. The Court not only did not attempt to do this but explicitly rested its order upon the acquiescence and consent of the company, (stating that he approved so long as the company desired it. The president of the company, Mr. C. O. Steberg, appeared in person before the Court.)

Ans. to direct interrogatory No. 15. The Court did enter an order (under the circumstances and for the reasons stated above) and I hereto attach a certified copy of that order. (This was drawn by my office on receipt of my cable. It is not worded exactly as I would have done. The aforesaid order is) marked exhibit "C."

Ans. to direct interrogatory No. 17. Yes, (with the exception of Mr. McDonald and P. Duff & Sons, whose suit and wholesale garnishment helped to bring about the receivership as stated above, there has been entire harmony and active co-operation throughout between the receivers and the creditors

(Deposition of Winfield R. Smith.)

of the company. A very largely attended meeting of the creditors, or attorneys representing them, including the creditors both within and without the state of Washington, was held at Seattle a few days after Mr. Schramm was appointed. Matters were gone over fully at that meeting and at the suggestion of the receiver a committee of creditors was appointed, being one representative for each of the four largest unsecured [97] creditors, namely, Balfour, Guthrie & Co., Schwabacher Bros. Company, Western Hardware & Metal Company and the Standard Oil Company.)

Ans. to direct interrogatory No. 19. I have already answered this in part. The creditors' committee and so far as we know all of the creditors except McDonald, favored the transfer of the title to these Alaska assets to the Washington receivers. Getting the entire management into the hands of one set of receivers was expressly favored by the creditors' committee and the transfers of the title to them were expressly approved by the committee. (McDonald wished, without right, to be preferred to all others.)

Ans. to direct interrogatory No. 21. The deed and the bill of sale to the receivers covering the Alaska assets of the company (are common law transfers and were so intended. They) were made wholly voluntarily, (not under compulsion of any law or court.) There are statutes in the state of Washington providing for involuntary transfers but these statutes did not enter into this matter at all.

(Deposition of Winfield R. Smith.)

There was no occasion or thought of an involuntary or compelled transfer of these assets. (There was nothing farther from the fact. This transfer has none of the features of involuntary transfers for the benefit of creditors under the Washington law and practice.)

Ans. to direct interrogatory No. 21. I think of nothing further in answer to these interrogatories, except that the "Bernice" is of eleven tons burden only (and therefore there is no need under the law of requiring any bill of sale in the customs-house to effect a valid and binding transfer.) The "Bernice" was in the possession and control of the receivers from the day of their appointment (by the voluntary action of the company, just as the legal title was in them from the day) the bill of sale (was executed and delivered. [98] It) was delivered immediately upon its execution. (There was no intention to have anything of record, either in the custom-house or elsewhere, inconsistent with these facts. If there is anything inconsistent with them there, it is through a mistake and oversight.)

Cross-interrogatory No. 26. Ans. No. (The creditors' committee named above was acting for all the creditors, regardless where they happened to live.)

Ans. to cross-interrogatory No. 28. I do not recall the names of all the creditors there. They are relatively few and the claims small. (They have all been treated alike and only McDonald has tried to prefer himself over the rest.)



(Deposition of Winfield R. Smith.)

Ans. to cross-interrogatory No. 29. No dividend has been paid by the receivers, (but a considerable one will soon be paid to all creditors regardless of residence.)

Ans. to cross-interrogatory No. 36. The assets of the Pacific Coast & Norway Packing Company were valued in a sum considerably in excess of its liabilities at the time of the appointment of the receivers (and this was shown to the Superior Court of King County.)

Ans. to cross-interrogatory No. 37. Transfer of the assets of Alaska to the receivers made for the sake of efficient, economical, unified administration, to the benefit of all the creditors alike. (As I have explained in my direct examination the business of the company has always centered at Seattle, that was the natural and only effective and economical point for the management of its affairs to center. It would have been a business impossibility for the management to have been divided between Seattle and any point in Alaska.)

Ans. to cross-interrogatory No. 40. (Messrs. Schoenwald and Hills as receivers consult with me as the general attorney and I advise them as to matters in Alaska, the same as matters [99] in Washington, except in so far as the Alaska matters call for legal counsel. They have control of the Alaska assets and have had at all times, save for McDonald's attachment of the "Bernice" in his effort to put himself ahead of everybody else.)

(The following are the objections to answers in

(Deposition of Winfield R. Smith.)

the deposition of Winfield R. Smith, made by counsel for the defendants and filed with the clerk of the court:)

Ans. 6. All not responsive—may have been reason why *they applied* for receiver, but court records are reasons why receiver was appointed.

Ans. 7. Immaterial.

Ans. 8. All of it not responsive, and particularly all after the first line of answer—also volunteered.

Ans. 9. All not responsive, commencing with words “transfer of” and is not best evidence; volunteered.

Ans. 10. Move to strike all as not responsive and not the best evidence, except “Yes” and “The original writings, etc.”

Ans. 11. Not best evidence, hearsay; all of it unresponsive, and particularly all after the words “ancillary receivers in Alaska” in the third line; also volunteered.

Ans. 12. Move to strike all as volunteered and not responsive, except “I therefore covered the matter as well by cable as I could.” The other parts of answer are on its face hearsay.

Ans. 13. Move to strike all as volunteered and not responsive, and particularly all that part commencing with “approved the execution” to end of answer; also not the best evidence.

Ans. 14. Move to strike as hearsay, as it appears from answer to question 12 that he was in Alaska at the time, and move to strike all as not responsive and volunteered.

(Deposition of Winfield R. Smith.)

Ans. 15. Move to strike all as not responsive and volunteered, except words "The Court did enter an order, and I hereto attach a certified copy of that order. The aforesaid order [100] is marked exhibit "C."

Ans. 17. Move to strike all of answer as immaterial, and the whole thereof as not responsive and volunteered except "Yes" and commencing with words "The four largest," etc.

Ans. 18. Move to strike all answer as immaterial, and all of it as volunteered and not responsive, commencing with the words "Who therefore, etc."

Ans. 19. Move to strike all of answer as immaterial, and all of answer commencing with "McDonald wished" as not responsive and volunteered.

Ans. 20. Move to strike all answer as conclusions of law; not responsive; volunteered.

Ans. 21. Move to strike all answer as stating conclusion of law; volunteered; not responsive.

#### Cross-interrogatories.

Ans. 9. Failure to answer question.

Ans. 11 to and including 15 fails to answer.

Ans. 17 to and including 23 fails to answer.

Ans. 24. Fails to answer.

Ans. 26. Move to strike, volunteered; not responsive, all after "No."

Ans. 27. Fails to answer.

Ans. 28. Not responsive and volunteered, all commencing with words "They are relatively few," etc.

Ans. 29. Not responsive and volunteered, all commencing with "but a considerable," etc.

(Testimony of N. L. Burton.)

Ans. 36. Not responsive and volunteered, commencing with "and this was shown," etc.

Ans. 37. All of answer as volunteered and not responsive.

Ans. 38. Not responsive.

Ans. 40. All is volunteered and not responsive, commencing with words "They have control of the Alaska," etc.

Ans. 41. All volunteered and not responsive, after "As a creditor of the company," etc. [101]

**Testimony of N. L. Burton, for Plaintiffs.**

N. L. BURTON, introduced as a witness on behalf of the plaintiffs, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

**Direct Examination.**

(By Judge WINN.)

Q. State your name, residence and business.

A. Newark Lincoln Burton; reside in Juneau; attorney by profession.

Q. How long have you been practicing law in Juneau, Mr. Burton.

Judge GUNNISON.—We will admit he is an attorney at law and has been practicing here for a long time.

A. About ten years.

Q. I will ask you if you are personally acquainted with Mr. Winfield R. Smith, one of the witnesses who has testified in this case by deposition?

A. Yes, I am.

Q. Do you remember the occasion, Mr. Burton, of



(Testimony of N. L. Burton.)

Mr. Smith coming to Juneau on some mission in connection with this receivership matter?

A. I do.

Q. You met Mr. Smith here at that time?

A. I did; I met him prior to that time, and met him at that time as well.

Q. You took no part in any proceedings, though, that Mr. Smith had in this court?

A. Nothing more than looking up some law, in the office.

Q. You were not in the courthouse at the time Mr. Smith and I presented any matters to this Court?

A. I was not.

Q. Did you talk to Mr. Smith concerning this case?

Mr. ROBERTSON.—That is objected to as incompetent, irrelevant and immaterial. Any conversation which counsel might have [102] had with the attorney for the receiver in this case cannot be binding in any way upon this defendant, or on these defendants in this case.

Judge WINN.—It is only preliminary.

The COURT.—Objection overruled.

Judge GUNNISON.—Exception.

A. I did.

Q. You know Mr. Robertson, of the firm of Gunnison & Robertson? A. I do.

Q. How long have you known Mr. Robertson?

A. Pretty nearly ever since I have been in Juneau—probably nine years.

Q. I will ask you if, about the time that Mr. Smith

(Testimony of N. L. Burton.)

came here to attend to some matters in this receivership matter, you had any conversation with Mr. Robertson, one of the attorneys for the defendant in this case, of the firm of Gunnison and Robertson?

A. I did, shortly after Mr. Smith had been here.

Q. Do you remember approximately that date?

A. It was towards the end of October, the first conversation I had with Mr. Robertson.

Q. October what year? A. 1914.

Q. Did you know at that time in what capacity Mr. Robertson was acting, or in what connection or business relation he stood in regard to the defendant McDonald in this case?

Mr. ROBERTSON.—We object to that because this case was not in existence at that time—it was not commenced until January.

The COURT.—He has just been asked whether he knew.

A. I did.

Q. I will ask you as to whether or not you knew at that time that Mr. Robertson was representing McDonald and had the [103] promissory notes which were the basis of the suit, out of which this judgment accrued? A. I did.

Q. Now, I will ask you to state to the jury and Court what conversation or conversations you had with Mr. Robertson about his claim, and about any transfers, and so forth, that were being made of property of the Pacific Coast & Norway Packing Company.

Judge GUNNISON.—We object to that as incom-

(Testimony of N. L. Burton.)

petent, irrelevant and immaterial and not binding on this defendant; and further that the question does not ask with reference to conversations about any transfers that had been made, but transfers which were about to be made; and it is leading and suggestive.

Judge WINN.—I am going to follow it up and show that these conversations were repeated two or three times, just before the transfers were made and after the transfers were made, and that Mr. Robertson knew the transfers were made.

Judge GUNNISON.—We think it is further incompetent for the reason that conversations between them could not, in any way, bind the clients, or either of them.

The COURT.—Your objection is that this testimony is incompetent, irrelevant and immaterial.

Judge GUNNISON.—Yes.

The COURT.—That is all of your objection?

Judge GUNNISON.—Yes.

The COURT.—Very well; if it is immaterial the Court can strike it out. It may be admitted, subject to a motion to strike later on.

Judge GUNNISON.—Of course there is the further objection that it is not binding on the defendant.

The COURT.—Objection overruled.

Judge GUNNISON.—Exception. There is a further objection to that, that it calls for more than one conversation—we would [104] like to have the question limited.

Q. Tell the first conversation you had with Mr. Robertson.

(Testimony of N. L. Burton.)

A. At the time that Mr. Smith was up here on the matter of the ancillary receivership, on a Sunday in October, I came to the office; he saw me and stated—

Judge GUNNISON.—Who is that, Mr. Robertson or Mr. Smith?

The WITNESS.—I am simply fixing the time of that conversation.

Judge GUNNISON.—We object to anything that Mr. Smith said.

The COURT.—Yes, don't give the conversation between Mr. Smith and yourself—fix the time in your own mind.

A. About the end of October, 1914, I had my first conversation with Mr. Robertson concerning a transfer of all the property, real and personal, of the Pacific Coast & Norway Packing Company to the receivers. In that conversation I stated to Mr. Robertson that there had been no receiver appointed for Alaska—no ancillary receiver—and that it had been decided to transfer the property of the Pacific Coast & Norway Packing Company to the receiver for the benefit of the creditors, and that I had been assured that dollar for dollar would be paid to each and all of the creditors on their claims. That is the first conversation I had. I also asked him in that conversation—I think it was in that conversation; if it wasn't in that conversation, it was a few days afterwards—to send his claim for the parties he represented to the receivers—

Q. What claim did you have reference to that he was representing?



(Testimony of N. L. Burton.)

A. The claim of D. N. McDonald, one of the defendants in this case.

Q. Does that claim have anything to do with the suit that he brought upon which the attachment was sued out?

A. It is the claim upon which the attachment was sued out.

Q. I will ask you whether or not Smith knew that Mr. Robertson had a claim against this Pacific Coast & Norway Packing Company?

Judge GUNNISON.—We object to that as incompetent, irrelevant and [105] immaterial, what Mr. Smith knew.

The COURT.—Yes, I don't see what Mr. Smith has to do with it.

Q. I will ask you whether or not Mr. Smith has been associated with us in the conduct of both the suit that was brought by Mr. Robertson on the promissory notes, the suit which the attachment was sued out in, and also all matters pertaining to the affairs of this Packing Company?

Judge GUNNISON.—That is objected to as incompetent, irrelevant and immaterial.

The COURT.—It is not what Mr. Smith said; if the testimony is relevant at all, it is relevant only on what Mr. Robertson said, as the agent of McDonald.

Q. Now, do you remember what Mr. Robertson stated to you, on this first occasion, when you went to him and talked to him about this McDonald claim?

A. I couldn't state what Mr. Robertson replied. I do know, however, that he seemed to acquiesce—

(Testimony of N. L. Burton.)

Judge GUNNISON.—We object to the statement of counsel of what Mr. Robertson seemed to do.

The WITNESS.—I was going to correct that, Judge Gunnison.

Q. I will ask you if you remember in substance what Mr. Robertson's reply was when you put this proposition to him?

A. I am not able to just state what he did reply in substance; I can state generally what he gave me to understand from my conversation with him and his conduct and his apparent acquiescence.

Judge GUNNISON.—We move to strike that last phrase, "his apparent acquiescence."

The COURT.—He has not said anything yet. If you can state exactly what he said, state it; if you cannot state exactly what he said, you can state the substance of what he said.

A. I remember partly what he said at the time of that conversation—I think it was that particular conversation, but I [106] will not swear to that—it was either that conversation or a day or two afterwards—in that conversation he asked me the address of the receivers, for the purpose of sending the claim of D. N. McDonald, this particular claim, to the receivers, and I gave him that address and he made a memorandum of it; he had it on a piece of paper and of course I thought he sent the claim.

Judge GUNNISON.—That is objected to as incompetent, irrelevant and immaterial, what Mr. Burton thought.

Judge WINN.—That part may go out.

(Testimony of N. L. Burton.)

Q. Now, I will ask you if you had any other conversation with Mr. Robertson after the first conversation, about this conveyance having been made by this company to the receivers? A. I did.

Q. I will ask you to state to the jury substantially what that conversation with Mr. Robertson was.

Judge GUNNISON.—We object to that unless the time of the conversation is given.

The COURT.—Fix the time as near as you can.

Judge WINN.—I will withdraw that question.

Q. Do you remember approximately what time it was that you had the next conversation with Mr. Robertson concerning this McDonald claim and about any of the affairs of this company, especially the transfers that have been offered in evidence in this case?

A. As a matter of fact, Judge Winn, I had several conversations with Mr. Robertson and I cannot fix the dates, but I know I had a conversation only a short time after the first conversation—only a few days; it was sometime in November that I had the second conversation.

Q. Where was Mr. Robertson?

A. He was in our office.

Q. November of what year? [107]

A. 1914.

Q. Well, now, state if you had any conversation with him concerning these transfers and about the McDonald claim?

A. We talked about the McDonald claim, and I urged him to send his claim down to the receivers;

(Testimony of N. L. Burton.)

that we were sending our claim, and urged him to send his; it was the second time he took the address of the receivers. That conversation, I think—

Q. Was there anything said in that conversation concerning the property having been transferred to the receivers?

Judge GUNNISON.—We object to that as leading.

The COURT.—Yes, it is leading. Ask him what was said in that conversation, as near as he can remember.

Q. Go ahead under the Court's indication there and state.

A. In that second conversation, I don't believe anything was said about the property having been actually transferred, but in a later conversation I did tell him so.

Q. Now, about what time was it that you had any other conversation with Mr. Robertson concerning these affairs?

A. It was during the month of November—I don't remember just the date.

Q. 1914? A. 1914.

Q. Do you remember substantially what that conversation was?

A. I remember stating to Mr. Robertson—I think in a short conversation during the month of November,—that the transfers had been made to the receivers, and that the creditors of the corporation would be paid dollar for dollar; I told him that more than once—several times; I think Mr. Robertson will remember that.



(Testimony of N. L. Burton.)

Judge GUNNISON.—May we be considered, your Honor, as having objected to that question as incompetent, irrelevant and immaterial, and not binding on the defendants?

The COURT.—Yes. [108]

Q. Did you ever have any other or further conversation about these matters with Mr. Robertson?

A. I did later.

Q. Approximately what time and what place was that?

A. Later on—I don't know just the time, but I believe in December, 1914, or the early part of January, 1915—I ascertained from Seattle that the claim of Mr. McDonald had not been received by the receivers, and I was requested to see Mr. Robertson at once and get him to send the claim down. I called upon Mr. Robertson and stated to him that they had not received McDonald's claim, and asked him if he had sent it; he said no, he had been busy, and asked me the address of the receivers. I told him I had already given him the address and he said he had misplaced it. That was in Mr. Robertson's own private office. I went into our office, got the address of the receivers from someone in our office—the stenographer—and I returned to Mr. Robertson's office and gave him the address of the receivers to send McDonald's claim, this particular claim, to the receivers.

Q. Did you have any other or further conversation, or was this the last conversation?

A. That was the last conversation I had prior to

(Testimony of N. L. Burton.)

this judgment in the McDonald case.

Q. Now, after he commenced the suit and sued out the attachment, did you have any further conversation with him about his not having sent the claim in, or any matters pertaining to the affair?

Judge GUNNISON.—That is objected to as incompetent, irrelevant and immaterial. The lien of the attachment had already accrued and any conversation held after that time, or with reference to why he had not sent his claim to the receivers, is incompetent, irrelevant and immaterial. [109]

The COURT.—It would depend altogether on what the answer is—the question itself is not incompetent. Objection overruled.

Judge GUNNISON.—Exception.

A. Subsequent to the attachment in the McDonald case—subsequent to the bringing of that suit, when I ascertained it had been attached, I saw Mr. Robertson; I reminded him of our several conversations, and stated to him that I had thought and understood that he acquiesced and consented to the putting in of McDonald's claim, and that I had told him about the deed and about the conveyance of the property, and that he had misled me by asking for the receivers' address, and not having sent it, and that I had seen him the second or third time concerning that matter, and the second time gave him the address of these receivers to send that claim, during all of which times he had given me to understand it was perfectly agreeable to him, the execution of the deed and the matter of sending the claim to the receiver. I ex-

(Testimony of N. L. Burton.)

pressed myself to Mr. Robertson as being very much dissatisfied with that method between attorneys; and Mr. Robertson replied that he had not said to me that he consented for the transfer to be made, and he asked me if I could remember of his ever having done so. I told him candidly that I could not remember that he said yes or no, but his attitude, his conduct, and the way he took my conversations, and acted through all those conversations, certainly led me to believe that he agreed to this method of preserving the assets of this corporation. I reminded him at that time that I told him his client would be paid dollar for dollar, and he admitted that he remembered that; he also admitted that I had seen him concerning the claim and asked him to send the claim to the receiver, but he denied that I had told him concerning the transfers of the property to the receivers; he also denied that he knew of any ancillary receiver being appointed [110] or not appointed by this Court; I told him he certainly knew that the matter was pending in this court, that he had spoken to Judge Winn pertaining to the receiver and he knew about that matter, and I felt that he was not doing the right thing. I was very vigorous in my conversation with Mr. Robertson at that time, and I think Mr. Robertson will remember it.

Q. Is that the last conversation you had since that time?

A. We have had several conversations since that time—Mr. Robertson and I have been very good friends since then, and our conversations have al-

(Testimony of N. L. Burton.)

ways been pleasant.

Judge WINN.—That is all.

Cross-examination.

(By Judge GUNNISON.)

Q. When, Mr. Burton, was your firm first connected with the Pacific Coast & Norway Packing Company?

A. Several years, Judge Gunnison.

Q. Counsel has asked you with reference to the claim on which this defendant McDonald brought the action—what was that claim?

A. That was a claim of McDonald against the Pacific Coast & Norway Packing Company for some logs which he had furnished to the Pacific Coast & Norway Packing Company.

Q. And for which the Pacific Coast & Norway Packing Company had given him two notes?

A. Yes, sir.

Q. Those notes were the matters on which Mr. Robertson came to see you on the first occasion that you referred to, was it not?     A. No, sir.

Q. Mr. Robertson didn't go to see you in your office in reference to those notes?

A. The first time Mr. Robertson came to see me about those notes was quite a while prior to that, Judge Gunnison. [111]

Q. He notified you that one would be due around the latter part of October, did he not?     A. Yes, sir.

Q. The 26th of October?     A. Yes.

Q. What was the total amount of those notes?

A. Seven hundred and some dollars, I believe.



(Testimony of N. L. Burton.)

Q. Each was \$700? A. Yes, each note.

Q. And these were notes which the company had given the defendant McDonald in settlement of his claim?

A. Prior to the appointment of the receiver.

Q. In order to obviate an attachment suit that had then been started, wasn't it?

A. I don't know whether he commenced an attachment suit—he commenced a suit.

Q. He commenced a suit on that claim originally?

A. Yes.

Q. And the company settled it for these notes, didn't it? A. Yes, sir.

Q. And then they didn't pay the notes?

A. It didn't pay the notes; it went into the hands of a receiver.

Q. Where were the logs cut that were the basis of that, do you know?

Judge WINN.—I object to that question as incompetent, irrelevant and immaterial, and not proper cross-examination.

The COURT.—Objection sustained.

Judge GUNNISON.—Exception.

Q. This first conversation you had toward the end of October, Mr. Burton, what date was that?

A. I couldn't tell you the exact date, Judge Gunnison.

Q. Was it before the 26th of October? [112]

A. I can just fix the date in this way, that Mr. Smith was up here on this ancillary receiver matter the end of October, and it was following the Sunday

(Testimony of N. L. Burton.)

that he went away from here, which was towards the end of October.

Q. How many days after that Sunday was this conversation?

A. It was either the day after the first conversation, or two days afterwards; I am not sure whether it was the first or second day.

Q. That you had the conversation?

A. The first conversation; yes, sir.

Q. That took place in your office?

A. In my office. I might state, Judge Gunnison, that on the Monday—my impression is that it was Monday, I went to see Mr. Robertson and he wasn't in the office, and I then intended going in later on in the day, but I didn't do so, and it was the next day he came in my office and I took it up with him.

Q. What time of day was it, do you remember?

A. I am not sure—I couldn't tell the time; I think it was in the morning between 11 and 12. I am not sure about that, and I don't want to state that.

Q. This conversation was held in your private office? A. Yes, sir.

Q. At that time you stated to him that no receiver for the company in Alaska had been appointed, did you?

A. Yes; I stated to him at that time that Mr. Smith had abandoned his idea of getting a receiver appointed, and I told him some things concerning that matter which I will not repeat now. The idea was to convey the property by deed—that that was the better way and would save expense—I went through

(Testimony of N. L. Burton.)

the matter pretty thoroughly with Mr. Robertson at that time—that it would be better for all the claimants.

Q. Had the deeds passed at that time? [113]

A. That I don't know, but I believe so; I am not sure about that, and I would not want to answer that question.

Q. Did you tell Mr. Robertson that the deed had passed?

A. I am not sure about that. I said the proposition was to prepare deeds—that Mr. Smith was going back to have deeds prepared, conveying the property to the receivers.

Q. But you didn't tell Mr. Robertson there had been deeds executed or passed, did you?

A. No, I don't think so.

Q. You didn't tell him that he might rest assured that Mr. McDonald would be paid dollar for dollar, what was owing him? A. I did.

Q. Was that the first time you told Mr. Robertson that, with reference to this claim?

A. It might not have been.

Q. You had told him that several other times with reference to it, hadn't you?

A. I won't say several times, but I told him that before.

Q. That was one of the considerations for the execution of those notes, wasn't it?

A. I don't know what the state of his mind was in making those notes.

Q. And you told him to send the claim of Mr.

(Testimony of N. L. Burton.)

McDonald to the receivers on this first occasion, did you?

A. I am quite sure I did on the first occasion; if I didn't on the first occasion, as I testified before, it was very shortly afterwards.

Q. I am just trying to find out what you said with reference to it. Now, I understand that you are unable now to state what Mr. Robertson said to you in reply.

A. I am not able to say that he said yes or no, whether his client consented, or that he consented on behalf of his [114] client, but I do know that his entire manner and conduct led me to believe that it was agreeable; the fact that he asked for the address of the receivers for the purpose of sending his claim a day or two afterwards led me to believe that it was agreeable to him.

Q. Had both of these notes matured at that time?

A. They had matured.

Q. Both had?

A. They had matured, and it was five months afterwards he brought his suit.

Q. In October? A. Yes.

Q. Both notes had matured in October?

A. I am not very sure about that, but I am fairly sure they had; I think they had.

Q. I am not trying to trap you on the thing—I don't think they had; I think you will find one of them had not matured.

A. It was very shortly after they matured—very shortly after.



(Testimony of N. L. Burton.)

Q. You say now you were led by Mr. Robertson's actions to believe that he acquiesced in your proposition to send the claim to the receivers?

A. I certainly did, and so stated to Judge Winn that Mr. Robertson was agreeable to it.

Judge GUNNISON.—We move to strike what counsel said to Judge Winn.

The COURT.—Yes, that may be stricken.

Q. What were the things that led you to believe that Mr. Robertson acquiesced in this, Mr. Burton?

A. Well, a great many things. For instance, if you came into my office—his talk, his manner, he listened to all my conversation—listened to me all the way through; I told him about this plan, about this scheme, about these deeds, and it seemed to be perfectly agreeable to him. [115]

Q. What do you mean by seemed to be?

A. A day or two after that conversation—

Q. Wait a minute, please. What do you mean by the remark seemed to be?

A. His whole demeanor—his whole attitude. You can consent, Judge Gunnison, to a thing without saying yes or no; you can show your feeling in the matter of consent by your conduct, and sometimes it is stronger, probably, than saying yes.

Q. So your notion about that is that he, by his conduct, agreed to send the claims to the receiver, is that it?

A. No, sir; he absolutely told me he would send the claims to the receiver.

Q. He did—on this occasion?

(Testimony of N. L. Burton.)

A. Two or three days after that occasion.

Q. Confine yourself to this occasion.

A. As I told you before, whether this claim was mentioned on that particular occasion or not, I don't know, but I am quite sure I did mention it. These claims were mentioned to Mr. Robertson not once, not twice, but several times. Whether I mentioned it at the time I mentioned the transfer or not, I am not sure, but if I didn't do so, I did within a very few days thereafter.

Q. I thought you said that was the first time, two days after that Sunday was the first time that Mr. Robertson asked you for the receivers' address?

A. No, sir; I didn't so state.

Q. You didn't so state?

A. I think I stated it was either a day or two after the first conversation that he asked for the address.

Q. I misunderstood you.

A. I think that is my testimony. [116]

Q. Then Mr. Robertson said nothing on that particular occasion?

A. Oh, yes; he talked; I couldn't say he said yes or no, but his talk, his conversation, his conduct and his manner led me to believe absolutely that he consented.

Q. But you have no recollection as to what he said?

A. No, I couldn't say that he said "I consent" or "yes."

Q. Merely an impression that you had from his conversation and demeanor that he was going to send the claims to the receivers?

(Testimony of N. L. Burton.)

A. The first conversation?

Q. Yes, sir; I haven't talked about any other.

A. Well, as I have told you, Judge Gunnison, I am not absolutely certain in that first conversation we mentioned about the claims, but I am absolutely certain the purpose of my first conversation was to see Mr. Robertson to express to him that this Court had not appointed an ancillary receiver, that that had been abandoned; that the purpose of the company was to deed the property to the receivers; whether I mentioned that he send the claims on that occasion I don't know, but I did in a few days' time.

Q. And whether at that time he asked you for the address of the receivers you don't know?

A. No, I do not.

Q. Now, that is all you remember about the first conversation, is it?

A. That is all I remember of the first conversation.

Q. When was the second conversation?

A. Shortly afterwards.

Q. How shortly? A. Within a few days.

Q. In what month?

A. It may have been in November, but if it was it was in the very first part of November. [117]

Q. And this second conversation you had, where did you have it?

A. The second conversation was in Mr. Robertson's office.

Q. You and he were there alone, as far as you remember?

A. As far as I remember we were alone. That sec-

(Testimony of N. L. Burton.)

ond conversation is when he took the names down on a piece of paper.

Q. This is the first time he took the names down, is it?

A. He took the names down on a piece of paper that second conversation—I think it was the second conversation—it may be the third one. As I mentioned before, I talked about this proposition with Mr. Robertson several times.

Q. You stated in your direct examination that he took down the names three times—the last time you had to go back to your office to get the names for him.

A. I think you are mistaken about that.

Q. That is what my notes show.

A. He took it down twice.

Q. The second time you went back to your own office to get the names for him?

A. Yes, sir; I went to my office to get the address, and this was prior to the attachment.

Q. The attachment suit. Now, on this second occasion, a few days after the first one in Mr. Robertson's office, what was said to Mr. Robertson?

A. I asked him to send the claims to the receivers; that we were sending our claims to the receivers, and asked him to send his if he had not done so; he asked me for the address of the receivers and put it on a piece of paper.

Q. This is the first time he asked you?

A. I think it was the first time, Judge Gunnison; I wouldn't swear to that; he put it on a piece of



(Testimony of N. L. Burton.)

paper on his desk. The next time I asked him about his claims he told me he mislaid that paper—he admitted he got the address, but said he had mislaid the paper. [118]

Q. You testified on direct examination that on this occasion there was nothing said about the property having been actually transferred?

A. No, sir; I don't believe there was. I was then satisfied in my own mind that he consented to the transfer, and it was only a matter of getting his claim in to the receivers.

Q. So you didn't say anything about the property having been transferred?

A. I don't believe I did; there was no occasion to.

Q. Did you then know it had been transferred?

A. In reference to the transfer—if you will pardon me, Mr. Smith telegraphed from Juneau to Seattle while he was here concerning the transfer—the preparation of those deeds and the order of the Court, and that was telegraphed to Seattle. I had in my mind that the deed was in the course of preparation or had been prepared, or would be prepared, in view of that telegram. The actual execution of those deeds I didn't know until the deeds were received here, or we received a letter from Smith saying they had been executed—I didn't know it before.

Q. When did you receive them here, Mr. Burton?

A. The deeds came with the deposition, and I had a copy sent during this case.

Q. It was after the commencement of this suit?

A. It was after the commencement of the McDonald action, anyway.

(Testimony of N. L. Burton.)

Q. That is, it was after the commencement of this action?

A. That is when I first saw the deeds—saw that they had been executed.

Q. When did you have information they had been executed? A. I couldn't tell you that.

Q. You didn't have it at the time of the second conversation with Mr. Robertson?

A. I didn't have any more knowledge than I did at the first conversation; [119] I knew they were either prepared or would be prepared.

Q. You knew that was the plan?

A. I knew that was the plan.

Q. And that was as far as your knowledge went?

A. In fact I stated to Mr. Robertson that that was the plan.

Q. That was the statement you made to him on the first occasion, but not on the second?

A. On the second I am not sure whether I mentioned the deeds or not.

Q. Later in the month of November, you had another conversation?

A. I think I did, during the latter part of November.

Q. What did you say to Mr. Robertson then?

A. It was principally about the claims; I think I asked him to send his claim in.

Q. Where was that conversation held?

A. Well, I couldn't give you the place where these conversations were concerning the claims, because I had more than one—I had several. I met him on the

(Testimony of N. L. Burton.)

stairway, I think, one day and told him about those claims, and he told me he had been so busy he hadn't sent them, leading me to believe that he was going to send the claims, but that he had been too busy.

Q. What was it he said that led you to believe—

A. He told me he would attend to the matter—that he had been busy and hadn't had time to attend to the matter.

Q. That is what he said?

A. Words to that effect—I cannot give the exact words.

Q. Did you, in this conversation, in November, tell him anything about the conveyances or bills of sale?

A. I don't remember that I did.

Q. Now, you had another conversation in December?

A. I am quite sure I did—probably more than one; I had at least one. [120]

Q. In your direct examination you said you had a conversation in December or early in January.

A. I did.

Q. Now, which? A. I am not sure.

Q. One or the other—was it before or after the suit was commenced?

A. It was before this suit was commenced.

Q. I mean the attachment suit as distinguished from the replevin suit.

A. Absolutely all these conversations were before the suits were commenced except the conversation I had after the attachment suit was commenced—I got a telegram from Petersburg that the boat was

(Testimony of N. L. Burton.)

attached, and I immediately saw Mr. Robertson and charged him with bad faith.

Q. This conversation you had in December or early in January was the result of a letter from your chief counsel in Seattle?

A. Result of a letter or telegram.

Q. That the McDonald claims had not been filed, and you went into Mr. Robertson's office then to see him, and this conversation occurred?

A. That was prior to the attachment?

Q. Yes—this was in December or January?

A. Yes; that was in Mr. Robertson's office; I remember that distinctly; I haven't any doubt about that at all; I am very sure about that.

Q. And that was another time Mr. Roberston couldn't remember the receivers' address, and you went back to your office and got the address?

A. Yes, sir; and Mr. Robertson said, "I will put it down in a book so I won't lose it."

Q. Was there anything said there that he was going to send the [121] claims to the receivers—or the claim?

A. He asked me for the address for the purpose of sending the claim to the receiver. If he was getting the address for the purpose of deceiving me, and making me think he was going to send that claim to the receiver, that is certainly the worst kind of deception. What else could he want the address for?

Q. Well, our firm were the attorneys for a creditor of that concern, weren't they? A. Yes, sir.

Q. Is it your idea that he merely asked for the



(Testimony of N. L. Burton.)

address of those receivers or of Mr. Smith,—did he ask for the address of the receivers or Smith?

A. I went into Mr. Robertson's office and gave him the address of the receivers for the express purpose of sending his claims, and I said to him—

Q. Did you give him Smith's address, or Schoenwald's?     A. The receiver, Schoenwald.

Q. What was it?

A. I don't remember, but I think it was in the Smith Building; I am not sure about that.

Q. Not even sure about that now?     .

A. Another thing—I remember telling Mr. Robertson at that time that I had had that address several times but had forgotten it, and I went into the office and got the address; and I think Mr. Roberston remembers all that, too.

Q. Was that before or after Christmas, do you remember?

A. No, I know it was before any suit was brought.

Q. Are you able to fix the time when you received the letter or telegram from Mr. Smith that the claim of McDonald had not been filed?

A. I can fix the date of that telegram approximately, that Smith sent asking why Roberston had not sent his claim—something about the attachment had been filed, and what was [122] the matter; that there had been an understanding that the claim was to be filed.

Q. What was the date?

A. That was sometime in January.

Q. In January?     A. I think so.

(Testimony of N. L. Burton.)

Q. Is that the telegram that induced you to go in and see Mr. Robertson on this last occasion?

A. No; that was the telegram that caused me to go and see Mr. Robertson and charge him with bad faith.

Q. That was after the attachment? A. Yes, sir.

Q. On this occasion, late in December or early in January, did you tell Mr. Robertson the property had been transferred?

A. I don't remember; I don't think I did; I will say I didn't.

Q. The principal thing you were after, then, was to know why he had not sent his claim to the receiver, was it?

A. That was the principal thing I was after at that time, knowing, as I had reason to believe, that he knew that the transfer had been made of the property to the receiver.

Q. What do you mean by that, Mr. Burton? I am asking for my own information.

A. In the first place, the thing was to see Mr. Robertson,—acting on the instructions of Mr. Smith, to see your firm—Mr. Robertson was mentioned because he had been attending to the matter, and ask Mr. Robertson's consent to the transfer of this property to the receiver.

Q. You mean the Alaska property?

A. Yes, the Alaska property. At that time Mr. Smith explained to me—and this was the purpose of seeing Mr. Robertson—that he wanted to have all the creditors in harmony—in perfect harmony;

(Testimony of N. L. Burton.)

the big creditors in Seattle had consented and [123] were in harmony and consented to a receiver down there; and a receiver was to be appointed up here, but other matters coming up, he abandoned that receivership and decided to have those deeds executed and the purpose of seeing Mr. Robertson at that time was to get him, on behalf of Mr. McDonald, to consent to that transfer, realizing that possibly if he didn't consent to that transfer that there might be some trouble; and so I had that expressly in mind in trying to keep all the creditors in harmony with that situation; that was what I had in mind when I saw Mr. Robertson, so my purpose on the first occasion was to get his consent to the transfer.

Q. Did you get it?

A. After I had got what I felt to be his consent, or his client's—his conduct at that particular time—the whole conversation led me to believe he did consent, and I felt absolutely sure he did consent. After that was done I felt there was no reason to take the matter of transfer up with him again; the thing was to get the claim down to the receiver.

Q. Did you present to him at any time any written instrument asking for the consent, either of our firm or McDonald, to the transfer to the receiver?

A. No, sir.

Q. Did you ever show him a copy of any conveyance?      A. I did not.

(Testimony of N. L. Burton.)

Judge GUNNISON.—That is all.

WITNESS EXCUSED.

(Whereupon court adjourned until 2 o'clock P. M.)

[124]

### AFTERNOON SESSION.

December 21, 1915, 2 P. M.

Judge WINN.—Mr. Robertson, will you admit in this suit that we put up a bond with the Marshal, and that the boat has been turned over to the plaintiffs in the case?

Mr. ROBERTSON.—Yes; that is admitted in the pleadings.

The COURT.—And is now in the jurisdiction of the court.

Judge WINN.—And has been in the jurisdiction of the court at all times.

Judge WINN.—We will now read the deposition of E. Schoenwald.

(Whereupon said deposition was read as follows:)

Mr. ROBERTSON.—I understand that all the objections we made to the interrogatories of Mr. Smith are allowed to go to the interrogatories propounded to Mr. Schoenwald.

The COURT.—Let the record show that all the objections to the questions are overruled.

### **Deposition of Ernest Schoenwald.**

Int. 1. Please state your name, residence and occupation.

A. My name is Ernest Schoenwald. I reside in Seattle, Washington. I am a receiver of Pacific Coast & Norway Packing Company and have been



(Deposition of Ernest Schoenwald.)

since the receivership was started in the middle of September, 1914.

Int. 2. State whether you are attorney for the above named E. Schoenwald and S. T. Hills as receivers of the Pacific Coast & Norway Packing Company, and if so how long you have been such attorney?

(No answer to this question.)

Int. 3. State whether you were attorney for said Pacific Coast & Norway Packing Company prior to being attorney for the receivers, how long you continued as attorney for such corporation, and what, if any, part you took as such attorney for said corporation in the suit brought against it for the appointment of receivers, and in which such receivers were appointed. [125]

A. My only connection with the Pacific Coast & Norway Packing Company before I was appointed receiver was that for nearly two months I had been acting as a director and as manager of the company. The former manager was removed in July, 1914. I had no interest in the company but at the suggestion of large creditors and stockholders I had been investigating its affairs in co-operation with the majority of the board of directors and they got me to act as manager, I taking just enough stock to qualify me as a member of the board. I really was acting more as a trustee for the creditors to straighten matters out.

Int. 4. State whether the said corporation has since employed any other attorney in the receivership matters.

(Deposition of Ernest Schoenwald.)

A. I believe the Pacific Coast & Norway Packing Company has not employed any other lawyer in the receivership matters but Winfield R. Smith at the outset. He ceased to act as the company's attorney before he became attorney for the receivers.

Int. 5. Please state whether or not you are familiar with and have personal knowledge of the reasons why receivers were appointed for said Pacific Coast & Norway Packing Company.

A. Yes—I know very well why the receivers were appointed.

Int. 6. If so, state such reasons in full.

A. Many things combined, a number of which were sudden and unexpected. There were very few poor fish in one big lot resulting from disobedience of orders at the cannery one afternoon and big stories got out giving the idea that the entire large lot of fish would not pass inspection. This was followed immediately by suit by Duff & Sons at Pittsburg, and in that suit both the company's bank account and all the pack stored at Seattle awaiting sale and shipment were tied up. Other creditors then threatened immediate suit. These [126] things came just at a time when a large number of notes were falling due and defeated the arrangements which the company had made to care for these. There was nothing left then but receivership to protect all the creditors alike and straighten out the company's affairs as quickly as possible.

Int. 7. Were any other receivers appointed for said corporations?

(Deposition of Ernest Schoenwald.)

A. A few days after that, S. T. Hills was on application to the court appointed an advisory receiver. There were no other receivers appointed anywhere.

Int. 8. State if you know what disposition was made of the property, real and personal, of the Pacific Coast & Norway Packing Company upon the appointment and qualification of Mr. Schoenwald as receiver, and state expressly as to the property and assets located in Alaska, including the gasoline boat "Bernice." What further, if anything, was done with such property and assets upon the appointment and qualification of Mr. Hills as coreceiver?

A. I took charge of all the property. By telegraphic direction from the company all the property at Alaska, including the "Bernice" was immediately turned over to the receivers, and all operations from that time on were conducted by them. When Mr. Hills was appointed he simply shared in the possession with me.

Int. 9. State whether the said receivers have been conducting the business of the said Pacific Coast & Norway Packing Company in Alaska, and if so, when they, or Mr. Schoenwald, began to do so.

A. Yes—they have. I began to conduct it the next day after my appointment as receiver.

Int. 10. State whether the real and personal property belonging to said corporation in the Territory of Alaska, including the said gasoline boat "Bernice," was transferred by written [127] instruments delivered to the receivers, and if so, when, and attach hereto the said writing or writings, mark-

(Deposition of Ernest Schoenwald.)

ing them appropriately as exhibits constituting a part of your answer to this question.

A. Yes, all of the real and personal property in Alaska was transferred to the receivers by deed and bill of sale. I haven't these. They were in the possession of the receivers' attorney, Winfield R. Smith, and I believe are attached to his deposition in this case.

Int. 11. State if you know what was the occasion for the execution of these instruments and whether they were executed and delivered voluntarily by the Pacific Coast & Norway Packing Company.

A. It was first proposed to have the court in Alaska appoint the same receivers there and Mr. Smith went up to Juneau to attend to this matter, among others. Various legal questions arose and it seemed likely that there might be a different receiver or receivers appointed. The Washington receivers had petitioned the court, and I believe a hearing was had, but no decision was ever made. Everybody was anxious to have the affairs of the company managed as simply as possible, and especially to be all in one hands. It was of great importance to manage the company only from one point, and Seattle was the natural point for that. The action was entirely voluntary by the company for the benefit of all concerned.

Int. 12. What, if anything, did you have to do with the execution and delivery of said instruments, and state fully the circumstances and conditions surrounding and leading up to their execution?



(Deposition of Ernest Schoenwald.)

A. I have already largely answered this. After the matter was agreed upon, I appeared personally before the Superior Court at Seattle, being the court of the receivership, together with Mr. Kells, a lawyer in Mr. Smith's office, and Mr. Steberg, [128] the president of the company. We told the Court how matters stood and what we desired. The Court asked particularly whether the company desired this, and Mr. Steberg told him it did. We also told him that the committee of the creditors, and everybody interested, so far as could be determined, was in favor of the action as the natural, simple and economical thing to do. The Court then approved the arrangement, and the deed and bill of sale, which had already been drawn, were signed by the company through its president, and were delivered by Mr. Steberg to me.

Int. 13. State whether or not, if you know, the trustees and stockholders of the Pacific Coast & Norway Packing Company authorized or acquiesced in the execution and delivery of said instruments.

A. Yes, I do know that all the trustees (as I believe the directors are called here) and all the stockholders of the Pacific Coast & Norway Packing Company desired and approved giving the receivers title to the Alaska assets so as to save any separate receivership. I myself talked with all of the other directors, including a little later the one who lives in Minneapolis. The others all live in the general neighborhood of Seattle. Also I communicated at the time with the great majority of the stockholders. Later, when I was in Minneapolis, I conferred with the rest

(Deposition of Ernest Schoenwald.)

of them there. I think that I talked with all of the stockholders, unless, perhaps, a few small ones in Minneapolis, and even in their case I talked with persons who were speaking for them. We had informal meetings of the stockholders in different places.

Int. 14. State fully whether or not, if you know, the Superior Court of King County, being the court of the receivership, compelled the execution and delivery of the said instruments, or whether the same were executed voluntarily by the said Pacific Coast & Norway Packing Company without compulsion.  
[129]

A. I have already fully answered this—the Court simply approved the arrangement which had been made, after inquiring and being told, in my hearing, that the company, as well as the creditors' committee and the receivers, favored this.

Int. 15. If the said court did enter any order in the premises, please so state, and attach a certified copy of said order as a part of your answer to this question.

A. The court did enter an order but I have no copy of it. I believe one is already attached to Mr. Smith's deposition.

Int. 16. State, if you know, why and under what circumstances the said order was entered, and why the said written transfers were ordered, executed and delivered.

A. I have fully answered this question.

Int. 17. State whether there has been any active

(Deposition of Ernest Schoenwald.)

co-operation throughout the receivership between the receivers and creditors of the Pacific Coast & Norway Packing Company, and if so, state by and through whom the said creditors actively co-operated with said receivers.

A. Yes, there was throughout. Every important action has been approved by the creditors' committee, as well as by the Court.

Int. 18. If you have mentioned a creditors' committee, state when such committee was selected, how and by whom, of whom it consists, and why these persons were selected, if you know.

A. This committee was selected at a large meeting of the creditors held within a week after I was appointed receiver. It consists of representatives of the four largest unsecured creditors. They were chosen because of this fact. It consists of Mr. Pattullo, of Balfour-Guthrie & Company; Mr. Frank J. Speckert, of Western Hardware & Metal Company; Mr. John McLean, Northwest Manager for the Standard Oil Company, and E. Morganstern, of Schwabacher Bros. Company.

Int. 19. State, if you know, what at that time was, and since has [130] been, the attitude of the creditors of Pacific Coast & Norway Packing Company towards the assets in Alaska, and especially towards the immediate delivery of the said assets to the receivers upon their appointment, and the retention of such assets since by the receivers, and towards the written transfers of the said assets hereinabove mentioned and set forth.

(Deposition of Ernest Schoenwald.)

A. As said, the creditors have all favored the transfer of the Alaska assets to the receivers. The transfer has never been questioned or objected to by anyone except Mr. D. N. McDonald, who is a defendant in this action, and he tried to get his claim paid in full.

Int. 20. State whether the conveyance of the assets of said Pacific Coast & Norway Packing Company unto said receivers, including the gasoline boat "Bernice," was made under and by virtue of any Washington Statute or under compulsion of law, or whether the deeds of conveyance were intended common-law deeds. Answer fully.

A. Not being a lawyer I can't answer this question.

Int. 21. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in the cause? If yes, set forth the same fully and at large in your answer.

A. I might say that the tonnage of the "Bernice" is eleven tons.

#### Cross-interrogatories.

Cross-int. 1. In what court and in what State were E. Schoenwald and S. T. Hills appointed receivers for the Pacific Coast & Norway Packing Company?

A. I believe the court is the Superior Court at Seattle.



(Deposition of Ernest Schoenwald.)

Cross-int. 2. Was the gasoline boat "Bernice" in the State of Washington at any time during the period from September 15, 1914, to April 28, 1915?

[131]      A. No.

Cross-int. 3. Was the gasoline boat "Bernice" at all times within the jurisdiction of the District Court of the First Division of the Territory of Alaska, during the period from September 15, 1914, to April 28, 1915? If your answer is in the negative, state the periods of time, giving dates, that said boat was outside the jurisdiction of said court.

A. The "Bernice" was at all times in Alaska, at or near Petersburg.

Cross-int. 4. Was the gasoline boat "Bernice," during the period from September 15, 1914, to February 8, 1915, licensed under documents issued by the officials of the United States Customs District for Alaska?      A. I have already answered this.

Judge WINN.—I object to that. It is rebuttal testimony, if it is necessary at all.

The COURT.—I think that should not go in.

Judge GUNNISON.—Exception.

Cross-int. 5. Was any bill of sale or other document conveying the gasoline boat "Bernice" from the Pacific Coast & Norway Packing Company to E. Schoenwald and S. T. Hills, as receivers, or to either of them as receivers, filed for record or recorded with the United States Customs officials for the Customs District of Alaska, at any time prior to February 10, 1915? If your answer is in the affirmative, state the date that said bill of sale or other

(Deposition of Ernest Schoenwald.)

document was recorded with said officials.

A. No, at no time.

Cross-int. 6. Have E. Schoenwald and S. T. Hills, or either of them, ever been appointed receivers of the Pacific Coast & Norway Packing Company, by any court of the District or Territory of Alaska? [132]

A. No, the Alaska court has not appointed any receivers.

Cross-int. 7. Was the conveyance or transfer of the gasoline boat "Bernice" to Schoenwald and Hills, or to either of them, made prior to the appointment of those gentlemen as receivers by the Superior Court of King County, State of Washington?

A. No.

Cross-int. 8. Did Honorable Everett Smith, Judge of the Superior Court of King County, for the State of Washington, on or about October 26, 1914, make an order directing that the Pacific Coast & Norway Packing Company transfer all of its personal assets in Alaska to Schoenwald and Hills, as receivers?

A. Yes.

Cross-int. 9. Was the bill of sale or conveyance of the gasoline boat "Bernice" to Schoenwald and Hills as receivers made in pursuance to the order of the Superior Court of King County, entered by that court on or about October 26, 1914?

A. This has already been covered in my testimony.

Cross-int. 10. Was a meeting of the board of directors or trustees of the Pacific Coast & Norway Packing Company held for the purpose of authoriz-

(Deposition of Ernest Schoenwald.)

ing and acquiescing in the execution and delivery of the instrument conveying the gasoline launch "Bernice" to Schoenwald and Hills as receivers?

A. There has never been a meeting of the board of directors at all since the receivers were appointed.

(Questions 11, 12, 13, 14 and 15 not read, as they refer to above question regarding meeting.)

Cross-int. 16. Was a meeting of the stockholders of the Pacific Coast & Norway Packing Company held for the purpose of authorizing and acquiescing in the execution and delivery of the instrument conveying the gasoline launch "Bernice" to Schoenwald and Hills as receivers? [133]

A. Likewise no meeting of the stockholders has been called and no formal meeting held since the annual meeting before the receivership.

(Questions 17, 18, 19, 20, 21, 22 and 23 not read, as they refer to question No. 16.)

Cross-int. 24. Did you, as attorney for said Schoenwald and Hills, as receivers, cause to be made and entered the order of the Superior Court of King County, dated on or about October 26, 1914, which order is referred to in cross-interrogatory No. 8?

A. I believe this has been fully answered.

(Cross-interrogatory 25 not read.)

Cross-int. 26. Has a committee of Alaskan creditors been selected and appointed in Alaska to co-operate with Schoenwald and Hills as receivers?

Judge GUNNISON.—We object to that answer, as it is not responsive.

The COURT.—Objection sustained.

(Deposition of Ernest Schoenwald.)

(Whereupon the entire answer to cross-interrogatory No. 26 was stricken and not read.)

(Cross-interrogatory No. 27 not read.)

Cross-int. 28. State the names of the creditors of said Pacific Coast & Norway Packing Company who live in Alaska.

(No answer to above question in deposition.)

Judge WINN.—The answer to No. 26 is an answer to No. 28.

The COURT.—If there is no answer in the deposition I don't see how there is anything for the Court to rule on.

Judge WINN.—The answer to No. 26 does answer it,—No. 28, and I insist that that answer go in.

The COURT.—I cannot go through a deposition to find out whether a question has been answered in some other answer.

Cross-int. 29. State the dividend that has been paid to Alaskan creditors by Schoenwald and Hills as receivers, up to and including October 12, 1915.  
[134]

A. No dividend has ben paid by the receivers.

Cross-int. 30. Were Schoenwald and Hills appointed receivers upon a petition of one Roy W. Nevin, in cause No. 103,639, of the Superior Court of King County, State of Washington?

A. The plaintiff in the receivership case is Roy W. Nevin.

Cross-int. 31. Was Roy W. Nevin a creditor of the Pacific Coast & Norway Packing Company at the time of the filing of his petition in cause No. 103,639



(Deposition of Ernest Schoenwald.)

of the Superior Court of King County, State of Washington? A. Yes, Nevin was a creditor.

Cross-int. 32. Was a conveyance of the gasoline boat "Bernice" to Schoenwald and Hills as receivers, made after Honorable Robert W. Jennings, Judge of the District Court for the First Division of Alaska, had refused to grant the petition of Roy W. Nevin for the appointment of an ancillary receiver of the Pacific Coast & Norway Packing Company in the Territory of Alaska?

A. Nevin did not petition in Alaska. The receivers petitioned there to have their authority extended over Alaska too. I have already told what I know about this.

Cross-int. 33. Was Roy W. Nevin a creditor of the Pacific Coast & Norway Packing Company at the time of the filing of his petition in the District Court of Alaska, for the appointment of a receiver for said corporation?

(No answer.)

Cross-int. 34. Of what State has E. Schoenwald been a citizen and resident since September 15, 1914?

A. Washington.

Cross-int. 35. Of what State has S. T. Hills been a citizen and resident since September 15, 1914?

A. Washington.

Cross-int. 36. Was the Pacific Coast & Norway Packing Company insolvent at the time of the appointment of Schoenwald and [135] Hills as receivers, of such, by the Superior Court of King County, State of Washington?

(Deposition of Ernest Schoenwald.)

A. The company could not meet its obligations as these fell due. The assets appeared to be largely in excess of the liabilities, and although the book values were too high, it appeared that the assets were quite a good deal in excess of the debts.

Cross-int. 37. Was the conveyance to Schoenwald and Hills as receivers, of the gasoline boat "Bernice," as well as the other personal assets in Alaska of the Pacific Coast & Norway Packing Company, necessary to the successful conduct of the receivership by said Schoenwald and Hills as receivers?

A. No, it was not absolutely necessary but it was the natural and common sense thing to do and enabled the business to be handled and the assets to be realized on more cheaply and quickly.

Cross-int. 38. Are all of your answers to the direct and cross-interrogatories propounded to you in this deposition based upon your personal and actual knowledge? If your answer to this question is in the negative, state which answers are not, indicating by the particular number of each direct and cross-interrogatory to which your answers are not based upon personal and actual knowledge.

A. Yes, my answers are based on actual personal knowledge, except in so far as I have touched on questions of law.

Cross-int. 39. Are you an impartial witness in view of the fact that you are one of the attorneys for the plaintiff in the case in which this deposition is being taken?

A. I have no interest in the company or in the out-

(Deposition of Ernest Schoenwald.)

come except my duty as receiver and desire to get the very best results possible for all the creditors. My connection does not make any difference whatever with my testimony. [136]

Cross-int. 40. Have you dictated or outlined the plan of procedure under which Schoenwald and Hills, as receivers, are acting in endeavoring to obtain control of the assets of the Pacific Coast & Norway Packing Company, which are located in Alaska.

(No answer.)

Cross-int. 41. Is it not to your personal interest to have the assets in Alaska, of the Pacific Coast & Norway Packing Company administered by the courts of Washington?

A. I have just answered as to this.

Mr. ROBERTSON.—I would like, if the Court please, to show on the record our objections to these various answers of Schoenwald's, which are made up and filed the same as we did to the Smith deposition.

The COURT.—You had an opportunity to object as the deposition was being read—I didn't hear any objection except one, and that one I sustained. For the sake of the record, you can make all the objections you wish, as not being responsive, and the record may show they are all overruled except in so far as the answers as read sustain the objections.

Mr. ROBERTSON.—We also would like to make a motion, which motion should apply separately to each of these various depositions, that the whole of each deposition be stricken on the ground that the deponents giving the depositions have failed to an-

(Deposition of Ernest Schoenwald.)

swer cross-interrogatories.

The COURT.—That motion comes too late—you should have moved to suppress the deposition, and you should have done that before the trial. You cannot have the deposition read, and then at the last minute make that objection. The motion is denied.

Mr. ROBERTSON.—Exception.

Judge WINN.—Before the case is closed, we would like to offer [137] in evidence the Schoenwald deposition.

The COURT.—The record may show the Schoenwald deposition was offered.

Judge GUNNISON.—And the same objections were made to that.

The COURT.—The motion in so far as the Schoenwald deposition is concerned is in time, because that has just been read; but whether you are in time or not, the motion will be overruled so far as the admission of the depositions as a whole is concerned.

Mr. ROBERTSON.—I want the record to show that we made the same objections to all these questions which your Honor has now permitted to go in on this deposition, as when they were first originally interposed—the objections to the questions which the Court has now permitted to be read.

The COURT.—The record may so show.

Judge WINN.—That is our case.

Judge GUNNISON.—Defendants move to strike those parts of the depositions of Winfield R. Smith, L. C. Kells, C. O. Steberg and E. Schoenwald which refer to any action or wish on the part of individual



(Deposition of Ernest Schoenwald.)

directors or trustees, on the ground that the individual action or wish or opinion of stockholders or directors of a corporation are not the action of the corporation and have no legal effect for or on behalf of the corporation itself.

The COURT.—Motion denied.

(The foregoing deposition is the deposition of E. Schoenwald, excepting only those portions thereof which were stricken by the Court, and plaintiffs allowed an exception. The answers, in which is contained the portion so stricken, are as follows,—the stricken portions appearing in parenthesis.)

Ans. to direct interrogatory No. 8. I took charge of all the property. (That in Washington by the Court's order, and that [138] in Alaska by the voluntary action of the company.) By telegraphic direction from the company all the property at Alaska, including the "Bernice," was immediately turned over to the receivers, and all operations from that time on were conducted by them. When Mr. Hills was appointed he simply shared in the possession with me.

Ans. to direct interrogatory No. 11. It was first proposed to have the Court in Alaska appoint the same receivers there, and Mr. Smith went up to Juneau to attend to this matter among others. Various legal questions arose and it seemed likely that there might be a different receiver or receivers appointed. The Washington receivers had petitioned the Court and I believe a hearing was had, but no decision was ever made. Everybody. was anxious

(Deposition of Ernest Schoenwald.)

to have the affairs of the company managed as simply as possible, and especially to be all in one hands. It was of great importance to manage the company only from one point and Seattle was the natural point for that. (Its business had always been directed from there. Therefore it was decided at a conference between the receivers, their attorney, the creditors' committee and the company through its president, Mr. Steberg, who was in touch with the other directors, that the title to the Alaska assets would be transferred to the two receivers.) The action was entirely voluntary by the company for the benefit of all concerned.

Ans. to direct interrogatory No. 19. As said, the creditors have all favored the transfer of the Alaska assets to the receivers. The transfer has never been questioned or objected to by anyone except Mr. D. N. McDonald, who is a defendant in this action, and he tried to get his claim paid in full (although he had no better right than the other creditors.)

Ans. to direct interrogatory No. 20. Not being a lawyer, I can't [139] answer this question (except to say that I never heard any suggestion of a law, and that the court in Washington merely carried out the arrangement and request of the company, the creditors' committee and the receivers by approving the taking of title by the receivers.)

Ans. to direct interrogatory No. 21. I might say that the tonnage of the "Bernice" is eleven tons (and I was therefore advised that there was no need of any bill of sale being recorded in the custom-house.

(Deposition of Ernest Schoenwald.)

These boats, including the "Bernice," had been laid up for the winter before the title was transferred to the receivers late in October, and the boats were not used again until early the following spring this year. After transfer to us of the title in October I directed our custom's broker to procure the necessary change in the boat's papers. The boats hail from Seattle. I supposed accordingly that the new certificate and license had been issued in the name of the receivers as owners, but I found afterwards that the broker had misunderstood and obtained the papers in the name of the Pacific Coast & Norway Packing Company. I think I myself contributed to the mistake by signing in a more or less perfunctory manner some application or other paper submitted to me in completed form by the custom's broker and which I understood was prepared in accordance with my directions, but I did not realize doing this until my attention was drawn to the matter afterwards. What I meant was to have the papers issued at once in the name of the receivers, we being the owners. When I discovered the mistake I at once had this corrected and in March the papers were issued accordingly to the receivers as owners. As I have said, we had actually been the owners since late October, 1914, and we had been in actual possession of the boats at all times since the middle of September, 1914. Subsequent to the transfer to us in [140] late October there was no transfer of the "Bernice" made and no change whatever made in the records except this correction in March of the name of the person

(Deposition of Ernest Schoenwald.)  
to whom the license was issued.)

Ans. to cross-interrogatory No. 26. (The creditors' committee which I have testified about was appointed and acting for all the creditors, as well those in Alaska as anywhere else. The creditors in Alaska, aside from the bank at Petersburg, were small.)

Judge GUNNISON.—We move to strike all of the testimony of Mr. Burton on the ground that there is nothing therein shown which brings to the notice of the defendant, or his counsel, any transfer of any of the property actually having been made. That even if notice thereof had been given to counsel, in the absence of evidence of the filing for record of the transfer in some public places of record—properly in the office of the Collector of Customs for the District of Alaska—such notification would not be binding upon the defendant, and therefore the testimony is incompetent, irrelevant and immaterial.

The COURT.—Motion denied.

Plaintiff rests.

Defendant rests. [141]

Mr. ROBERTSON.—Defendant at this time moves the Court for a nonsuit on the grounds: That the plaintiffs have failed to prove their case in chief; that the evidence discloses that the plaintiffs are suing only in the capacity of receivers, and that as receivers appointed by a court of another jurisdiction, out of Alaska; that there is no evidence in the case that the plaintiffs are assignees for the benefit of creditors; that there is an attempt to show that the plaintiffs are assignees by virtue of a conveyance



which the evidence shows is an invalid conveyance of the company, because there is no evidence in the record disclosing that this conveyance was ever made at the direction of the corporation acting as a corporate body; that the evidence of the plaintiffs has disclosed that McDonald is a resident of the Territory of Alaska and a local creditor; that all the transactions arising in the case arose within the jurisdiction of this court; that the property in controversy, the "Bernice," is an American licensed vessel and documented in the Customs District of Alaska, and was documented in the Customs District of Alaska at all times, both before and since the receivership, and after it was attached, and in fact until it was released; that the evidence discloses that there was no record of any conveyance of this vessel to these plaintiffs in either of their capacities ever placed on record in either the United States Customs-house of the District of Alaska, or in the Commissioner's Precinct of Wrangell, wherein Petersburg is located; that the said conveyance does not purport to be made for any consideration; that the plaintiffs by their testimony [142] have admitted that in the offices where such documents should appear of record, and do ordinarily appear of record—the place provided by law—that this boat stood in the name of the Pacific Coast & Norway Packing Company at all times prior to the suit and prior to the receivership, and during the receivership, and up until sometime after the attachment. That the plaintiffs, by the pleadings, admit the fact of an action instituted by the defendant McDonald, of the due levy of an at-

tachment in that case, and of the taking of the "Bernice" under that attachment, of the judgment of this Court, which judgment provided for the sale of said vessel. There is no evidence of any notice of any transfer. I will be frank to say that I do not, personally, like to comment on Mr. Burton's testimony, but my recollection of his testimony is at this time that he did not tell me of any transfer, but conceding what Mr. Burton said was true, for the sake of this motion, Mr. Burton never told me there was any conveyance made; at the most, all he told me was that there was a plan for such conveyance. There is no record of any transfer, and the evidence fails entirely to show any corporate act on the part of the Pacific Coast and Norway Packing Company; it simply shows that whatever acts or acquiescence was indulged in by the consent of the stockholders was not indulged in by them to be any corporate act for that purpose. It fails to show, furthermore, if the Court please, that there was any voluntary act on the part of the corporation; it shows that if there was any such conveyance made, it was made directly under the order of the Superior Court of King County over personal property, which it is conceded by the plaintiff's case, was not in the jurisdiction of that court, but has at all times been in the jurisdiction of this court; for a *long prior* to the receivership had been, and still is, in this jurisdiction. And, if the Court please, [143] the record seems to us to show that it is a deliberate attempt to get property into their hands and custody—property that is situated in Alaska—after they presented some proceedings to your Honor, which proceedings were never

fully consummated, or never fully decided for some reason we are not advised of at this time; and on the further grounds that the evidence now shows that the plaintiffs in this suit are not the real parties in interest; that if any party could be a party in interest in this suit as plaintiff it would have to be the Pacific Coast & Norway Packing Company itself; and furthermore, on the ground that the evidence fully shows at this time that the plaintiffs have no legal capacity and no right to sue in this court in such an action as this against a local Alaskan creditor of the corporation.

(Whereupon said motion was taken under advisement by the Court, and an adjournment had until 10 o'clock to-morrow morning.)

#### MORNING SESSION.

December 22, 1915, 10 A. M.

The COURT.—In the matter of the motion made yesterday, the motion for a nonsuit will, at the present time, be denied.

Judge GUNNISON.—Exception.

(Whereupon, after argument by counsel respecting production of books, telegrams, letters, etc., court adjourned until 2 P. M.)

#### AFTERNOON SESSION.

December 22, 1915, 2 P. M.

Judge GUNNISON.—We have decided not to offer any evidence, but to rest on our motion for a nonsuit.

The COURT.—All right.

Mr. ROBERTSON.—If the Court please, the de-

fendant at this time moves for a directed verdict in favor of defendants on the following grounds: [144]

There is no proof whatsoever of any damages in the sum of \$500, or any other amount.

That the plaintiffs have failed *in toto* to prove the material allegations of their complaint; that at this time the record shows that if the plaintiffs are receivers in any court they are receivers in a court of foreign jurisdiction, not in this jurisdiction; that the property in question is, and at all times has been, in the Territory of Alaska; that so far as any attempted assignment being made to the plaintiffs by the corporation, that it was not the act of the corporation, that it has never been ratified or in any way acquiesced in or consented to by the corporation; that such assignment is not a common law assignment; that if it is any assignment whatever, it is an assignment that is based purely upon the proceedings instituted in the receivership action in a court of foreign jurisdiction. That at this time the evidence clearly shows that the defendant McDonald is an Alaskan creditor of this concern; it further shows that the said McDonald recovered a judgment in this court in an action on transactions which originated in the jurisdiction of this court; that this court entered a judgment after attachment had been levied upon the vessel in controversy, directing the sale of that vessel to satisfy the demands of Mr. McDonald; that the plaintiffs, neither in the capacity of receivers nor in the capacity of assignees, have any legal right to sue in this court in an action of this nature, wherein the defendant is an Alaskan



creditor. That they have failed to prove any knowledge whatsoever on the part of the defendants of any alleged assignment; that the record shows by the undisputed testimony of the plaintiffs, that if any such assignment was made, there was no notice, either actual or constructive, in any manner ever conveyed to the defendants, or to any person representing the defendants, or [145] either of them.

That the evidence further shows that the plaintiffs are not the real parties in interest, and that neither one of them is the real party in interest; that they are without capacity to sue in this court in either capacity they set up in their complaint.

That the evidence does not show that the assignment is a voluntary assignment, or any assignment whatever; and if it can be held to be any assignment, it was not made for the benefit of all the creditors of said company; it is not a good and sufficient deed of conveyance; it is not *bona fide*; it is invalid, and it did not and could not convey any personal property in the District of Alaska to the plaintiffs; and that they have entirely failed to show any record of any such transfer being made in the Territory of Alaska; that they have failed to show that either of the plaintiffs are acting under authority of a court of competent jurisdiction.

It further shows, if the Court please, by the undisputed testimony, that after the alleged receivership of this concern for a period of something over 14 months, in the state of Washington, that at this time there have been no dividends, and it is not denied that there has been no dividend whatsoever,

paid, or any distribution of assets, showing, as we contend, the damage the defendant McDonald would necessarily be put to if their action was sustained.

Further, that any assignment which was made did not include the power boat "Bernice"; that on the contrary, whatever property they purport to claim under the assignment, so far as the "Bernice" is concerned, was under a separate instrument, which was made at the direction of the court where the receivers had been appointed in the real receiver-ship case. [146]

That there is no evidence to show that the defendants, or either of them, knew of the appointment of the receivers prior to the attachment, or that they knew of the assignment to the plaintiffs for the benefit of all the creditors, or any assignment whatever; fails to show that the plaintiffs had possession of the power boat "Bernice" in the capacity in which they sue, or any act by which they took that possession. And I here respectfully refer to our motion for a nonsuit, and incorporate within this motion all the grounds that we specifically referred to at the time of making our motion for a nonsuit.

Judge WINN.—We do not understand in a motion for a directed verdict it is necessary to go into the grounds specifically, unless it is to inform the Court what we rely upon. We therefore at this time request the court to direct a verdict in favor of the plaintiffs in this case, on the grounds and for the reasons that the uncontradicted evidence in the case would only support a verdict in favor of the plaintiffs, and would not support a verdict in favor of the

defendants. We, however, state in this motion that we have waived any claim to damages for the retention of the boat by the defendants, so far as that is concerned, and stated to the Court yesterday that we would offer no proof upon the question of the \$500 damages, which we claim for the retention of the boat, but we do claim that upon the uncontradicted evidence that has been before the Court, that at this time a verdict could only be sustained in favor of the plaintiffs in this case, and that no other verdict would stand under the law and the evidence, as it is before the Court at the present time.

The COURT.—Now, gentlemen, both of you having moved for an instructed verdict, it is equivalent to both of you saying you are willing that the jury should be discharged and that the Court should decide the matter, especially in a case of this kind, [147] where there is absolutely no question of fact for the jury to pass on one way or the other.

Mr. ROBERTSON.—If the Court please, the defendants are willing to agree to the suggestion of your Honor that the jury be discharged at this time, as we think it is purely a matter of law, excepting, of course, we do not wish to be understood as in any wise having waived our motion for a nonsuit.

The COURT.—Have you any objection to the Court discharging the jury and trying the case as if it had been originally submitted to the Court.

Mr. ROBERTSON.—We have no objection.

Judge WINN.—We have no objection, either.

The COURT.—The record may show that counsel for both sides are willing that the jury should be dis-

charged without a verdict, and that the matter be treated as a trial before the Court without a jury, and as such, be submitted to the Court for its determination on the pleadings and on the evidence.

(Whereupon the jury was discharged, and the matter taken under advisement by the Court.)

The exhibits introduced are as followed: [148]

**Exhibit "A"—Complaint, Nevin vs. Pacific Coast & Norway Packing Co.**

*In the Superior Court of King County, Washington.*

No. 103,639.

ROY W. NEVIN,

Plaintiff,

vs.

PACIFIC COAST & NORWAY PACKING COMPANY, a Corporation,

Defendant.

Comes now the plaintiff above-named by Arthur Schramm, Jr., its attorney, and complains of the defendant as follows:

I.

The defendant is and at all times hereinafter mentioned was a corporation organized under the laws of the state of Minnesota, with its principal place of business at Minneapolis, and authorized to do and doing business in the State of Washington and the Territory of Alaska, its chief business office being located in the city of Seattle.

II.

That the copartnership of C. E. Dickinson & Company of Seattle, Washington, during the year 1914,



issued to the defendant policies of insurance upon its boats, buildings and consignments of merchandise, and unpaid premiums upon said policies amount to the sum of twelve hundred and eighty-four dollars (\$1,284).

### III.

No part of said premiums have been paid.

### IV.

That prior to the commencement of this action the said C. E. Dickinson & Company assigned to the plaintiff, for valuable consideration its claim mentioned in paragraph II.

### V.

The defendant corporation is financially embarrassed and [149] cannot meet its obligations as they mature. Suits have been begun against it and if its property is seized at forced sale sufficient cannot be realized to meet its obligations. Although defendant's assets now exceed its liabilities, said defendant is in imminent danger of insolvency.

WHEREFORE plaintiff prays for the appointment of a receiver of the property, assets and business of the defendant, to control and manage the same and to continue the business of said corporation for the benefit of all its creditors, and for judgment against said defendant in the amount of twelve hundred eighty-four dollars (\$1,284), with its costs and disbursements herein.

ARTHUR SCHRAMM, Jr.,  
Attorney for Plaintiff.

State of Washington,  
County of King,—ss.

Roy W. Nevin, being first duly sworn, on oath says :  
I am the plaintiff in the above-entitled action. I  
have read the foregoing complaint, know the contents  
thereof and believe the same to be true.

R. W. NEVIN.

Subscribed and sworn to before me this September  
15, 1914.

ARTHUR SCHRAMM, Jr.,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Filed in clerk's office Sept. 16, 1914. W. K. Sick-  
els, Clerk. By F. W. Smith, Deputy.

Pltfs. Exhibit No. "A." Received in evidence  
Dec. 20, 1915. In Cause No. 1264-A. J. W. Bell,  
Clerk. [150]

**Exhibit "B"—Answer,—Nevin vs. Pacific Coast &  
Norway Packing Co.**

*In the Superior Court of King County, Washington.*

ROY W. NEVIN,

Plaintiff,

vs.

PACIFIC COAST & NORWAY PACKING COM-  
PANY, a Corporation,

Defendant.

Comes now the defendant by Winfield R. Smith,  
its attorney, and answering the complaint herein al-  
leges:

## I.

Defendant admits indebtedness to said C. E. Dickinson & Co. on account of insurance premiums as alleged in paragraph II of the complaint, but has no accurate record of the amount of said indebtedness, and no knowledge or information sufficient to form a belief as to the truth of plaintiff's statement of said amount.

## II.

Concerning the truth of the allegation in paragraph IV of the complaint, defendant has no knowledge or information sufficient to form a belief.

WHEREFORE defendant prays that the complaint herein be dismissed, and for its costs and disbursements herein.

WINFIELD R. SMITH,  
Attorney for Defendant.

State of Washington,  
County of King,—ss.

C. O. Steberg, being first duly sworn, says: That he is the president and treas. of the defendant corporation and makes this verification in its behalf; that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

C. O. STEBERG.

Subscribed and sworn to before me this September 16, 1914.

LUCAS R. KELLS,  
Notary Public in and for the State of Washington,  
Residing at Seattle. [151]

Service of the within paper is hereby admitted this 16th day of September, 1914.

ARTHUR SCHRAMM, Jr.,  
Attorney for Plf.

Filed in Clerk's office. Sep. 16, 1914. W. K. Sickels, Clerk. By G. A. Grant, Deputy.

Pltfs. Exhibit No. "B." Received in evidence Dec. 20, 1916. In Cause No. 1264. J. W. Bell, Clerk.  
[152]

**Exhibit "C"—Order Appointing Receiver—Nevin v.  
Pacific Coast & Norway Packing Co.**

*In the Superior Court of King County, Washington.*

No. 103,639.

ROY W. NEVIN,

Plaintiff,

vs.

PACIFIC COAST & NORWAY PACKING COM-  
PANY, a Corporation,

Defendant.

Upon the verified complaint herein and after argument of counsel for the plaintiff and the defendant Pacific Coast & Norway Packing Company, it appearing to the Court that said defendant is in embarrassed financial circumstances and cannot meet its obligations as they mature; that suits have been begun against it and if its property is seized and sold at forced sale sufficient will not be realized to meet its obligations and that said defendant, though its assets now exceed its liabilities, is in imminent danger of insolvency.



IT IS HEREBY ORDERED that E. Schoenwald of Seattle, King County, Washington, be and he is hereby appointed receiver in this action of all the property, assets and business of the defendant upon his filing an undertaking executed to the State of Washington in the penal sum of \$20,000, with a sufficient surety to be approved by the Court, conditioned for the faithful discharge of the duties of such receiver in the usual form.

IT IS FURTHER ORDERED that the said receiver be and he is hereby empowered to take possession of and to do all things necessary to the preservation of the property and assets of the defendant, and continue the business of said defendant with full authority to do all things necessary thereto, until the further order of the Court and shall from time to time report to the Court his doings hereunder. [153]

Done in open court this September 16, 1914.

BOYD J. TALLMAN,  
Judge.

Filed in Clerk's office. Sep. 16, 1914. W. K. Sickels, Clerk. By F. W. Smith, Deputy.

Pltfs. Exhibit No. "C." Received in evidence Dec. 20, 1915. In Cause No. 1264-A. J. W. Bell, Clerk. [154]

**Complainant's Exhibit "D"—Receiver's Bond—  
Nevin v. Pacific Coast & Norway Packing Co.**

*In the Superior Court of the State of Washington,  
in and for the County of King.*

No. 103,639.

ROY W. NEVIN,

Plaintiff,

vs.

PACIFIC COAST & NORWAY PACKING COM-  
PANY, a Corporation,

Defendant.

KNOW ALL MEN BY THESE PRESENTS:  
That we, E. Schoenwald as principal, and the National Surety Company, a corporation organized under the laws of the State of New York, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the State of Washington in the just and full sum of Twenty Thousand no/100 Dollars, for the payment of which, truly to be made, we hereby bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed and dated this 16th day of September, A. D. 1914.

THE CONDITION of the foregoing bond is such that whereas, in the above-entitled action and by the above-entitled court, on the 16th day of September, A. D. 1914, the above-named principal was appointed receiver of the property, effects and business of the

Pacific Coast & Norway Packing Company, a corporation, with authority and instruction to take possession of all the property, assets and business and to preserve said property and continue the business of said corporation; and has been directed to give a bond to the said State of Washington in the sum of Twenty Thousand no/100 Dollars, according to law.

NOW, THEREFORE, If the above bounden principal shall and will faithfully discharge the duties of receiver in said action, and shall and will obey the orders of the Court therein, then this obligation shall be void, otherwise be and remain in full force [155] and effect.

E. SCHOENWALD. [Seal]  
NATIONAL SURETY COMPANY.  
By GEO. W. ALLEN,

Resident Vice-President.

[Corporate Seal] Attest: EDW. P. WELCH,  
Resident Assistant Secretary.

Above bond approved this 16th day of September,  
1914.

BOYD J. TALLMAN,

Judge.

Filed in Clerk's office. Sep. 16, 1914. W. K. Sickels, Clerk. By C. A. Grant, Deputy.

Pltfs. Exhibit No. "D." Received in evidence  
Dec. 20, 1915. In Cause No. 1264-A. J. W. Bell,  
Clerk. [156]

**Plaintiff's Exhibit "E"—Oath of Receiver—Nevin  
v. Pacific Coast & Norway Packing Co.**

*In the Superior Court of King County, Washington.*

No. 103,639.

ROY W. NEVIN,

Plaintiff,

vs.

PACIFIC COAST & NORWAY PACKING COM-  
PANY, a Corporation,

Defendant.

State of Washington,  
County of King,—ss.

E. Schoenwald, being first duly sworn, says: I have this day been appointed by order of this Court receiver in the above-entitled action. I will faithfully discharge the duties of said trust to the best of my ability.

E. SCHOENWALD.

Subscribed and sworn to before me this September 16, 1914.

LUCAS C. KELLS,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Filed in Clerk's office. Sep. 16, 1914. W. K. Sickels, Clerk. By G. A. Grant, Deputy.

Plft.'s Exhibit No. "E." Received in evidence Dec. 20, 1915. In Cause No. 1264-A. J. W. Bell, Clerk. [157]



**Plaintiff's Exhibit "F"—Order Appointing Joint  
Receiver and Instructing Receivers—Nevin v.  
Pacific Coast & Norway Packing Co.**

*In the Superior Court of King County, Washington.*

No. 103,639.

ROY W. NEVIN,

Plaintiff,

vs.

PACIFIC COAST & NORWAY PACKING COM-  
PANY, a Corporation,

Defendant.

It appearing to the Court that it is proper and desired by all concerned, including the present receiver, that a joint receiver be appointed as hereinafter set forth;

Now, therefore, it is ordered that S. T. Hills of Seattle, Washington, being the Secretary of the Seattle Merchants' and Credit Men's Association, be and he is hereby appointed a joint receiver in this action with E. Schoenwald, the present receiver, of all the property, assets and business of the defendant upon his filing an undertaking executed to the State of Washington in the penal sum of \$1,000, with a sufficient surety to be approved by the Court and conditioned in the usual form for the faithful discharge of his duties as such receiver.

IT IS FURTHER ORDERED that upon his filing such approved bond and his oath that he as such joint receiver shall be empowered equally with the present

receiver in the administration of the receivership and the operation of the business in accordance with the original Order appointing the receiver, save only that since it is contemplated that the present receiver will actively conduct the business and affairs of the receivership and the joint receiver hereby appointed will act chiefly in an advisory capacity, disbursements to be made in the receivership in accordance with the Orders of this Court up to the amount of one thousand dollars for any one disbursement shall be made by checks signed by E. Schoenwald alone as receiver as heretofore, and any disbursement [158] above the sum of one thousand dollars shall be made only upon check drawn by both receivers as such. A copy of this order shall be delivered forthwith to the National City Bank of Seattle, where the bank account of the receivership is now carried.

IT IS FURTHER ORDERED that the receivers do forthwith take any necessary and proper steps to the end of extending this receivership without delay over the property and assets of the defendant company located in the Territory of Alaska and its business operations therein.

Done in open court this September 25, 1914.

EVERETT SMITH,

Judge.

Filed in clerk's office Sep. 25, 1914. W. K. Sickels, Clerk. By F. W. Smith, Deputy.

Plf.'s Exhibit No. "F." Received in evidence Dec. 20, 1915. In Cause No. 1264-A. J. W. Bell, Clerk. [159]

**Plaintiff's Exhibit "G"—Receiver's Bond—Nevin  
v. Pacific Coast & Norway Packing Co.**

*In the Superior Court of the State of Washington,  
in and for the County of King.*

No. 103,639.

ROY W. NEVIN,

Plaintiff,

vs.

PACIFIC COAST & NORWAY PACKING COM-  
PANY, a Corporation,

Defendant.

KNOW ALL MEN BY THESE PRESENTS:  
That we, S. T. Hills, as principal, and the National  
Surety Company, a corporation organized under the  
laws of the State of New York, and authorized to  
transact the business of surety in the State of Wash-  
ington, as surety, are held and firmly bound unto  
The State of Washington in the just and full sum  
of One Thousand Dollars, for the payment of which,  
truly to be made, as we hereby bind ourselves, our  
heirs, executors, administrators, successors, and as-  
signs, jointly and severally, firmly by these presents.

Sealed and dated this 25th day of September, A. D.  
1914.

THE CONDITION of the foregoing bond is such  
that whereas, in the above-entitled action and by the  
above-entitled court, on the 25th day of September,  
A. D. 1914, the above-named principal was appointed  
receiver of the property, effects and business of the

Pacific Coast & Norway Packing Company, a corporation, with authority and instruction to take possession of all the property assets and business and to preserve said property and continue the business of said corporation and has been directed to give a bond to said State of Washington in the sum of One Thousand Dollars, according to law.

NOW, THEREFORE, if the above bounden principal shall and will faithfully discharge the duties of receiver in said action, and shall and will obey the orders of the Court therein, then this [160] obligation shall be void, otherwise be and remain in full force and effect.

S. T. HILLS. (Seal)

NATIONAL SURETY COMPANY.

By GEORGE W. ALLEN,

(Corporate Seal)

Attorney in Fact.

Approved Sep. 25/14.

EVERETT SMITH,

Judge.

Filed in clerk's office Sep. 25, 1914. W. K. Sickels, Clerk. By G. A. Grant, Deputy.

Plf.'s Exhibit No. "G." Received in evidence Dec. 20, 1915. In Cause No. 1264-A. J. W. Bell; Clerk. [161]



**Plaintiff's Exhibit "H"—Oath of Receiver—Nevin  
v. Pacific Coast & Norway Packing Co.**

*In the Superior Court of the State of Washington  
for King County.*

No. 103,639.

ROY W. NEVIN,

Plaintiff,

vs.

PACIFIC COAST & NORWAY PACKING COM-  
PANY, a Corporation,

Defendant.

State of Washington,  
County of King,—ss.

S. T. Hills, being duly sworn, says: I have this day been appointed by order of this Court, receiver in the above-entitled action, I will faithfully discharge the duties of said trust to the best of my ability.

S. T. HILLS.

Subscribed and sworn to before me this 25th day of September, 1914.

LUCAS C. KELLS,

Notary Public in and for the State of Washington,  
Residing at Seattle.

Filed in clerk's office Sep. 25, 1914. W. K. Sickels, Clerk. By F. W. Smith, Deputy.

Plf.'s Exhibit No. "H." Received in evidence Dec. 20, 1915. In Cause No. 1264-A. J. W. Bell, Clerk. [162]

**Plaintiff's Exhibit "I"—Certificate of Clerk of  
of Superior Court to Transcript in Nevin v.  
Pacific Coast & Norway Packing Co.**

*In the Superior Court of the State of Washington  
for the County of King.*

State of Washington,  
County of King,—ss.

I, W. K. Sickels, County Clerk of King County and ex-officio Clerk of the Superior Court of the State of Washington for the County of King, do hereby certify that the foregoing is a full, true and correct transcript of the Complaint, Answer, Order Appointing Receiver, Receiver's Bond, Oath of Receiver, Order Appointing Joint Receiver and Instructing Receivers, Receiver's Bond and Oath of Receiver, Cause No. 103,639, Roy W. Nevin, Plaintiff, vs. Pacific Coast & Norway Packing Co., a cor., Deft., as the same appears on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court this 28th day of September, 1914.

W. K. SICKELS,  
Clerk.

(Seal of Superior Court, King County, Washington.)

State of Washington,  
County of King,—ss.

I, Boyd J. Tallman, Judge of the Superior Court of the State of Washington for the County of King, the same being a Court of Record and having a clerk

and seal, do hereby certify that W. K. Sickels, who has signed the foregoing attestation, is the duly elected and qualified clerk of King County and ex-officio clerk of the superior court of the State of Washington for the County of King, that said signature is his genuine handwriting and that all his official acts as such clerk are entitled to full faith and credit, and I further certify that said attestation is in due form of law.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of said court to be hereunto affixed this 28th day of [163] September, 1914.

BOYD J. TALLMAN,  
Judge.

(Seal Superior Court, King Co., Washington.)

State of Washington,  
County of King,—ss.

I, W. K. Sickels, County Clerk of King County and ex-officio clerk of the Superior Court of the State of Washington for the County of King, do hereby certify that the Honorable Boyd J. Tallman, who has signed the foregoing certificate, is the duly elected and qualified Judge of said Court, and that the signature of said Judge to said certificate is his genuine handwriting.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court this 28th day of September, A. D. 1914.

W. K. SICKELS,  
Clerk.

(Seal, Superior Court King Co., Washington.)

Plf.'s Exhibit No. "I." Received in evidence Dec. 20, 1915. In Cause No. 1264-A. J. W. Bell, Clerk. [164]

**Plaintiff's Exhibit "J"—Exhibit "A" to Smith  
Deposition in Nevin v. Pacific Coast & Norway  
Packing Co.**

THIS INDENTURE, made this 26th day of October, 1914, between PACIFIC COAST & NORWAY PACKING COMPANY, a corporation of the State of Minnesota, party of the first part, and E. SCHOENWALD and S. T. HILLS, as receivers of said company, parties of the second part, WITNESS-ETH:

That the said party of the first part for and in consideration of the sum of one dollar (\$1.00) money of the United States to it in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, and convey unto the said parties of the second part and to their heirs and assigns the following described tracts, lots or parcels of land situate, lying and being in the territory of Alaska, particularly bounded and described as follows:

(1) All of the following described tract situated on the north side of Metkoff Island on the east shore of Wrangell Narrows, Alaska, more particularly described as follows, with magnetic variation  $29^{\circ} 45'$  east:

Beginning at a point at high water mark on the north end shore of Metkoff Island, marked Beg. Cor. No. 1, Sur. No. 282 from whence U. S. Location Monument No. 7 bears south  $57^{\circ} 57'$  west 86.97 chains



distant; thence east 19.70 chains to corner No. 2, thence north 19.99 chains to corner No. 3; thence west 21.31 chains to corner No. 4; thence south  $1^{\circ} 45'$  east along beach 20 chains to corner No. 1, the place of beginning, containing 39.99 acres, being the lands embraced in survey No. 282, and being now platted (without dedication) as the town of Petersburg, Alaska; *excepting*, however, therefrom the portions heretofore sold by the first party, namely the following lands as shown on the recorded plat of the town of Petersburg, to wit: All of block 5, lots 4, 5, 6, 7 and 10, block 6, lots 4, 5, 6, 8, 9, 10, block 7, all of block 13 excepting lots 4 and 7, lots 1, 5, 8, 9, and 10, of block 14, and lots 1, 4, 6, 7, and 10, [165] block 15; together with appurtenances.

(2) All of the first party's right, claim, interest and easement in and to the tidelands upon which stand the first party's cannery, cannery dock, boat-house, warehouse and shipping dock, adjoining to the westward blocks 1 and 2 of the said plat of Petersburg; and in and to tidelands on which stand the shipyard and shipways adjoining to the westward block 4 and F Street as shown on said plat.

(3) All the first party's right, claim, interest and easement in and to the forty acre tract covered by Application No. 222 to purchase from the United States, which tract lies southwardly from the tract first above described, and on a part of the easterly end of which stand the first party's sawmill, box factory, lumber yard, wharves and booms used in connection therewith.

(4) All the first party's right, claim, interest and

easement in and to that certain tract comprising 79.929 acres according to official survey, for the purchase of which from the United States application has been made for a trade or manufacturing site, situated at Tonka on Kopreanof Island on the west shore of Wrangell Narrows, as shown by the official survey of this tract as a trade and manufacturing site of the first party, the survey having been made by Lloyd G. Hill, United States Deputy Surveyor, together with the tidelands in Wrangell Narrows in front of said site, on which stand the first party's cannery and wharf used in connection therewith.

TOGETHER with the appurtenances, to have and to hold the said premises with the appurtenances unto the said parties of the second part and to their heirs and assigns forever.

And the said party of the first part, its successors and assigns, does by these presents covenant, grant and agree to any with the said parties of the second part, their heirs and assigns, that it, the said party of the first part, its successors and assigns, all and singular, the premises hereinabove conveyed, described and granted, or mentioned, with the appurtenances unto [166] the said parties of the second part, their heirs and assigns, and against all and every person or persons whomsoever, lawfully claiming or to claim any part thereof, shall and will warrant and forever defend.

IN WITNESS WHEREOF the party of the first part has caused these presents to be signed and its corporate seal affixed by its president and secretary,

hereunto duly authorized.

PACIFIC COAST & NORWAY PACKING  
COMPANY.

By C. O. STEBERG,

Its President.

And E. SCHOENWALD,

Its Secretary.

In the presence of:

MINA I. ANDREWS,

EUGENE W. BOND.

State of Washington,

County of King,—ss.

This is to certify that before me the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, on this 26th day of October, 1914, personally appeared C. O. Steberg and E. Schoenwald, to me known to be the president and secretary of the Pacific Coast & Norway Packing Company, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of the said corporation for the uses and purposes therein mentioned, and on oath each for himself states that he was authorized to execute the said instrument in the name and as the act of the said corporation and that the seal affixed is the corporate seal of said corporation.

WITNESS my hand and seal the day and year above written.

(Notarial Seal)

LUCAS C. KELLS,

Notary Public in and for the State of Washington,

Residing at Seattle.

State of Washington,  
County of King,—ss.

No. 8835

I, W. K. Sickels, County Clerk of King County and ex-officio Clerk of the Superior Court of the State of Washington, [167] for the County of King, the same being a Court of Record, do hereby certify that Lucas C. Kells, the person whose name is subscribed to the annexed acknowledgment, certificate of proof or affidavit, and before whom the said was taken, was at the date thereof, and is now, a notary public in and for said State, duly appointed and commissioned; that by virtue of his said office, he is authorized to take acknowledgments and proofs of deeds or conveyances of lands, tenements and hereditaments situate, lying and being in said State of Washington, and to administer oaths.

I do further certify that I am acquainted with the handwriting of the said Lucas C. Kells, and verily believe the name subscribed to the said annexed acknowledgment, certificate or proof or affidavit, is his proper and genuine signature, and that the same is executed according to the laws of the State of Washington.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, King County, Washington, this 26th day of October, A. D. 1914.

W. K. SICKELS,  
Clerk.

By W. J. RUMIN,  
Deputy.

(Seal of Superior Court, King County, Washington.)

“Exhibit A.” (To Smith deposition.)



Pltfs. Exhibit No. "J." Received in evidence Dec. 21, 1915. In Cause No. 1264-A. J. W. Bell, Clerk.  
[168]

**Plaintiff's Exhibit "K"—Exhibit "B" to Smith  
Deposition—In Nevin v. Pacific Coast & Nor-  
way Packing Co.**

KNOW ALL MEN BY THESE PRESENTS that pursuant to the order of the Superior Court of the State of Washington in and for King County, this day made and entered in the case of Roy W. Nevin, Plaintiff, v. Pacific Coast & Norway Packing Company, Defendant, No. 103,639 of said court, PACIFIC COAST & NORWAY PACKING COMPANY, a corporation organized under the laws of the State of Minnesota, first party, does hereby sell, transfer and set over unto E. Schoenwald and S. T. Hills, as receivers of the first party corporation and not otherwise, the following described personal property situated at the town of Petersburg on Wrangell Narrows in southeastern Alaska, namely:

(1) All enginers, boilers, machinery and equipment whatever located in the building upon lots 6, 7 and 8, block 4, of the plat of the town of Petersburg, comprising a machine shop belonging to the first party.

(2) The first party's two-line salmon cannery, cannery dock, boat house, warehouse, and shipping dock, including all buildings, wharves and other structures whatever, and all boilers, engines, machinery and other equipment whatever comprising all of the property of the said plant, which plant is located in the tidelands adjoining to the westward

blocks 1 and 2 of the said plat of Petersburg.

(3) The shipyard and shipways belonging to the first party constructed upon the tidelands adjoining to the westward block 4 and F Street, as shown on said plat.

(4) The first party's sawmill, box factory, lumber yard, wharves, and booms, together with all engines, boilers, machinery and equipment whatever comprising the first party's mill and factory plant and all thereof, which plant is located on, or upon the tidelands in front of the 40 acre tract covered by application No. 222 to purchase from the United States.

(5) The power boats "Marian," "Valkyrie," "Eunice," "Mildred" and "Bernice"; 3 power seine boats, 4 seine skiffs [169] 17 seine skiffs and tenders, pile driver on scow, 1 housed barge scow, and 3 stanchion scows; all of which boats, pile driver and scows are located at or near the cannery plant hereinabove described.

(6) The first party's buildings, wharves and other structures at or near Tonke, hereinabove described, including the cannery buildings and wharves, the store building and bunkhouse.

(7) The stock of merchandise in the company's store and warehouse at Petersburg, Alaska, all cannery, saw-mill and machine shop supplies, including tin plate, cans and canned salmon on hand in the warehouse or cannery; all tools in machine shop, saw-mill or cannery, and the logs and lumber at the company's sawmill at Petersburg; and any and all other personal property of the first party within the territory of Alaska.

IN WITNESS WHEREOF the first party has caused these presents to be signed and its corporate seal affixed by its president hereunto empowered this October 26, 1914, at Seattle, Washington.

**PACIFIC COAST & NORWAY PACKING  
COMPANY.**

(Corporate Seal)

By C. O. STEBERG,  
President.

Pltfs. Exhibit No. "K." Received in evidence Dec. 21, 1915. In Cause No. 1264-A. J. W. Bell, Clerk.

"Exhibit B" (To Smith deposition). [170]

**Plaintiff's Exhibit "L"—Order Directing Pacific  
Coast & Norway Packing Co. to Convey Prop-  
erty in Alaska to Receiver.**

*In the Superior Court of King County, Washington.*

No. 103,639.

ROY W. NEVIN,

Plaintiff,

vs.

**PACIFIC COAST & NORWAY PACKING COM-  
PANY, a Corporation,**

Defendant.

This matter coming on to be heard upon the application of E. Schoenwald and S. T. Hills as receivers of the Pacific Coast & Norway Packing Company for an order directing said company by its duly authorized officers to convey forthwith to said receivers all its real property in the territory of Alaska and to transfer to them all personalty there situated,

C. O. Steberg, president of said company, being present and consenting to such order, and it appearing to the court that said conveyance and transfer is necessary to the successful conduct of the receivership.

IT IS HEREBY ORDERED that the said Pacific Coast & Norway Packing Company convey to said receivers all its title to real estate situated in the territory of Alaska and transfer to said receivers all its personalty there situated, and said C. O. Steberg as president of said company is hereby directed to execute and deliver to said receivers a sufficient deed to said real estate and a bill of sale of said personalty.

Done in open court this October 26, 1914.

EVERETT SMITH,  
Judge.

Pltfs. Exhibit No. "L." Received in evidence Dec. 21, 1915. In Cause No. 1264—J. J. W. Bell, Clerk. Per ————, Deputy. [171]

**Exhibit "C" to Smith Deposition in Nevin v.  
Pacific Coast & Norway Packing Co.**

*In the Superior Court of the State of Washington for  
the County of King.*

No. 103,639.

State of Washington,  
County of King,—ss.  
ROY W. NEVIN,

Plaintiff,

vs.

PACIFIC COAST & NORWAY PACKING CO.,  
Defendant.



I, W. K. Sickels, County Clerk of King County, and ex-officio clerk of the Superior Court of the State of Washington for the County of King, do hereby certify that I have compared the foregoing copy with the original order in the above-entitled cause as the same appears on file in my office and the same is a true and perfect transcript of said original and of the whole thereof.

WITNESS my hand and the seal of the said Superior Court at my office in Seattle, this 2d day of Dec. 1915.

W. K. SICKELS,  
Clerk.

By F. H. Smith,  
Deputy.

(Seal of Superior Court of King County, Washington.)

(10¢ revenue stamp, cancelled.)

Exhibit "C" (To Smith deposition). [172]

United States of America,  
District of Alaska,  
Division No. One,—ss.

I do hereby certify that I am the official court stenographer for the First Judicial Division, Territory of Alaska; that as such I reported the proceedings in the trial of the above-entitled cause, to wit, E. Schoenwald and S. T. Hills and E. Schoenwald and S. T. Hills as Receivers and Assignees of Pacific Coast & Norway Packing Company, a corporation, plaintiffs, vs. Harry A. Bishop, as United States Marshal for the District of Alaska, Division No. 1, and D. N. McDonald, defendants; and that the above

and foregoing testimony and evidence is a full, true and correct transcript of all the testimony and evidence introduced upon the trial of said above-entitled cause.

Dated at Juneau, Alaska, March 14, 1916.

L. A. GREEN. [173]

BE IT FURTHER REMEMBERED that the above and foregoing, being all the evidence adduced, the plaintiffs requested the Court to make and adopt the following Findings of Fact and Conclusions of Law, which Findings of Fact and Conclusions of Law the Court refused to make and adopt, and plaintiffs were allowed an exception. [174]

*In the District Court for the District of Alaska, Division Number One, at Juneau.*

No. 1264-A.

E. SHOENWALD and S. T. HILLS, and E. SCHOENWALD and S. T. HILLS as Receivers and Assignees of the PACIFIC COAST & NORWAY PACKING COMPANY, a Corporation,

Plaintiffs,

vs.

HARRY A. BISHOP, as United States Marshal for the District of Alaska Division Number One, and D. N. McDONALD,

Defendants.

**Findings of Fact and Conclusions of Law Offered  
by Plaintiffs.**

This cause came on regularly for trial on the 20th

day of December, A. D. 1915, before the above-entitled court, Winn & Burton appearing as attorneys for plaintiffs, and Gunnison & Robertson appearing as attorneys for defendants. A jury was empaneled and sworn to try said above-entitled cause, and after all the evidence had been introduced and submitted, both the plaintiffs and defendants moved the Court for an instructed verdict. Whereupon, the plaintiffs and defendants, by their respective attorneys, consented to the dismissal of the jury and that the above-entitled court, without a jury, should pass upon and determine the issues in the above-entitled cause. Therefore, from the evidence introduced the Court now makes its Findings of Fact and Conclusions of Law, to wit:

## FINDINGS OF FACT.

### I.

That E. Schoenwald and S. T. Hills, the above named plaintiffs, were, on, to wit, the 16th day of September, A. D. 1914, and on the 25th day of September, A. D. 1914 respectively appointed receivers of the Pacific Coast & Norway Packing Company, a corporation [175] organized under the laws of the State of Minnesota, by the Superior Court of King County, State of Washington, being a court of competent jurisdiction, in the case of Roy W. Niven vs. Pacific Coast & Norway Packing Company, cause No. 103, 639, of said King County Superior Court. That immediately thereafter said Schoenwald and Hills duly filed their bonds as such receivers and such bonds were duly and regularly approved and they duly and regularly qualified and became the receivers

of the said Pacific Coast & Norway Packing Company, and have ever since been, and now are receivers of said company.

## II.

That the appointment of said plaintiffs, Schoenwald and Hills as receivers of said Pacific Coast & Norway Packing Company was voluntary on the part of said Pacific Coast & Norway Packing Company and at the suggestion and with the acquiescence, assistance and consent of said company and was done solely for the purpose of preserving and keeping intact the property and assets of said company and preventing forced sales thereof by reason of certain suits which had been brought, or were being threatened, and such appointment of said receivers was in order to secure equality among the creditors of the company; that at the time of the appointment of said plaintiffs as receivers, as aforesaid, the assets of said Pacific Coast & Norway Packing Company exceeded the liabilities, but such assets could not at said time be realized upon, and in order to protect and preserve the same it was deemed wise to have such receivers appointed to protect all the creditors alike, as aforesaid.

## III.

That on, to wit, the 26th day of October, 1914, the said Pacific Coast & Norway Packing Company to further protect all the creditors alike and avoid the expense and occasion of appointing ancillary receivers in Alaska, and for the sake of [176] efficient, economic and unified administration of the assets of said Pacific Coast & Norway Packing Com-



pany, to the benefit of all the creditors alike, voluntarily and of its own free will and accord, conveyed all of its property, both real and personal, to the said E. Schoenwald and S. T. Hills in trust for the benefit of all creditors of said corporation; the real estate being conveyed by deed and the personal property, including the gasoline boat, "Bernice," by bill of sale, and the said Schoenwald and Hills immediately thereafter took possession of all of such personal property, including the said gasoline boat, "Bernice."

#### IV.

That at or about the time of the execution of the deed and bill of sale aforesaid, by the said Pacific Coast & Norway Packing Company conveying all of its property to said Schoenwald and Hills, as aforesaid, Mr. Robertson of the firm of Gunnison & Robertson, who were the attorneys for, and representing the claim of, D. N. McDonald, one of the defendants herein, the said Robertson having charge of the matter, was notified that the Pacific Coast & Norway Packing Company were about to execute such deed and bill of sale, and was asked to forward the claim of said McDonald, which consisted of two promissory notes then in the possession of said Robertson, to the receivers for collection, and the said Robertson did, at or about said time of the execution of said deed and bill of sale, take down the address of said receivers for the purpose of submitting said claim of D. N. McDonald to said receivers. That at said time neither the said Robertson nor the firm of Gunnison & Robertson nor the said D. N. McDonald, the de-

fendant, made any objection or in any way showed any disapproval to the execution of such deed and bill of sale conveying all the property to said Schoenwald and Hills for the benefit of the creditors as aforesaid. [177] That the first intimation the plaintiffs had of any dissatisfaction on the part of said D. N. McDonald to the conveyance by said Pacific Coast & Norway Packing Company to the said Schoenwald and Hills of all of its property, including the gasoline boat "Bernice," was several months thereafter when the said D. N. McDonald attached said gasoline boat "Bernice." That said Gunnison & Robertson at all times herein mentioned knew of the appointment of said Schoenwald and Hills as receivers aforesaid.

V.

That with the exception of D. N. McDonald, the defendant in this suit, and P. Duff & Sons, whose suit and wholesale garnishment helped to bring about the appointment of the receivers, there has been entire harmony and active co-operation between the receivers and Schoenwald and Hills as trustees and the creditors of the Pacific Coast & Norway Packing Company; that a committee of creditors was appointed consisting of four, being one representative of each of the four largest unsecured creditors, and so far as known to the receivers and said Schoenwald and Hills, trustees, all of the creditors except McDonald favored the transfer of the title to the Alaska assets, including the gasoline boat, "Bernice," to said receivers.

That the Pacific Coast & Norway Packing Company is a corporation organized under the laws of the

State of Minnesota, but its principal office is, and always has been, in the city of Seattle, State of Washington, and the policy of the company was determined in said City of Seattle and five out of the said directors live in or near Seattle in the State of Washington, and the Board held its meetings there and all of the financial affairs of said company were conducted there and a vast majority of the creditors, both in numbers and amount, were Seattle creditors or Eastern creditors from whom purchases were made at Seattle. [178]

#### VI.

That every trustee or director and all the stockholders of the Pacific Coast & Norway Packing Company desired, approved and ratified giving the said conveyance to said Schoenwald and Hills as trustees aforesaid, conveying the title to the Alaska assets, and approved the execution of the instruments transferring such assets to said E. Schoenwald and S. T. Hills as trustees; that this approval was not by a formal meeting of the stockholders, but was obtained by Mr. Schoenwald, one of the receivers, communicating with the great majority of the stockholders, and personally conferring with the rest of them; that the consent and approval of all the directors, as well as all of the stockholders, to the execution of the instruments transferring the legal title of the Alaska assets to the receivers was obtained in the manner aforesaid.

#### VII.

That on, to wit, the 26th day of October, A. D. 1914, the Superior Court of King County, State of Wash-

ington, in the case of Roy W. Niven, plaintiff, vs. Pacific Coast & Norway Packing Company, a corporation, defendant, cause No. 103,639, made and entered an order authorizing the Pacific Coast & Norway Packing Company to convey its Alaska assets to E. Schoenwald and S. T. Hills, and with the consent of said Pacific Coast & Norway Packing Company, which said corporation was present and represented in court at the time of making said order.

### VIII.

That the transfer of the assets by said Pacific Coast & Norway Packing Company to E. Schoenwald and S. T. Hills was not made under and by virtue of any Washington statute, or any statute, or by compulsion of law, but the instruments were prepared and executed voluntarily by said company with a view of passing legal title to the said trustees in accordance with the [179] principles of common law, and for the benefit of all the creditors of said corporation alike.

From the foregoing FINDINGS OF FACT, the Court makes and finds the following,

### CONCLUSIONS OF LAW.

#### I.

That the instruments executed by the said Pacific Coast & Norway Packing Company to E. Schoenwald and S. T. Hills as receivers, and described in the Findings of Fact, being a deed conveying the real estate, and a bill of sale conveying the personal property, including the gasoline boat, "Bernice," were voluntary common law conveyances, and conveyed all of the assets of said Pacific Coast & Norway



Packing Company, including the gasoline boat, "Bernice," in the Territory of Alaska, to said E. Schoenwald and S. T. Hills as trustees, and that as such trustees they hold the assets described in said instruments in trust for the benefit of all the creditors alike, including the said D. N. McDonald, defendant herein.

## II.

That the foregoing instruments transferring the assets of said Pacific Coast & Norway Packing Company to said Schoenwald and Hills as aforesaid, were fully ratified and consented to by all of the directors and stockholders of said Pacific Coast & Norway Packing Company.

## III.

That the said D. N. McDonald, the defendant herein, had sufficient notice of the transfer of said assets to said E. Schoenwald and S. T. Hills to know that the company had, or were about to transfer its assets, and his failure to object to the same at the time, together with his conduct, amounted to an acquiescence and consent to such transfers, especially in view of the fact that he lead plaintiffs to believe that he would submit [180] his claim to said receivers under the arrangement that said receivers had or should have the full legal title to all of the assets of said Pacific Coast & Norway Packing Company, for the benefit of all of its creditors alike.

## IV.

That said Bill of Sale transferring the gasoline boat "Bernice" to the said Schoenwald and Hills, as trustees, was not under or by virtue of any statute or

by compulsion of any law, but was a voluntary common law transfer, made and executed freely and voluntarily by said Pacific Coast & Norway Packing Company, in trust, for the benefit of all the creditors of said company alike, and the legal title to said gasoline boat "Bernice" is vested in said Schoenwald and Hills for the benefit of such creditors, and is not subject to the subsequent attachment of defendant, McDonald, a local creditor of said Pacific Coast & Norway Packing Company.

V.

And the Court further concludes that ever since the making out and execution of the Bill of Sale herein mentioned by the said Pacific Coast & Norway Packing Company to the said Schoenwald and Hills as trustees, and at the time that the said McDonald sued out the attachment herein referred to and made the levy upon the said gasoline boat "Bernice," and at the time of the commencement of this replevin suit, the said Schoenwald and Hills were, and now are, the owners of and entitled to the possession of said gasoline boat "Bernice."

Let Judgment be entered herein accordingly.

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Judge.

Foregoing requested Findings refused—Exception allowed.

R. W. J.,  
Judge. [181]

Filed in the District Court, District of Alaska,  
First Division. Jan. 26, 1916. J. W. Bell, Clerk.  
By John T. Reed, Deputy.

[Endorsed]: No. 1264—A. In the District Court for the Territory of Alaska, Division No. 1. E. Schoenwald et al., Plaintiffs, vs. Harry v. Bishop et al., Defendants Findings of Fact and Conclusions of Law. Winn & Burton, Attorneys for Plaintiffs. Juneau, Alaska. [182]

BE IT FURTHER REMEMBERED, that the Court thereupon made and adopted its Findings of Fact and Conclusions of Law, as follows: [183]

*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

No. 1264—A.

E. SCHOENWALD and S. T. HILLS, and E. SCHOENWALD and S. T. HILLS, as Receivers and Assignees of the PACIFIC COAST AND NORWAY PACKING COMPANY, a Corporation,

Plaintiffs,

vs.

HARRY A. BISHOP, as United States Marshal for the First Division of the District of Alaska, and D. N. McDONALD,

Defendants.

**Findings of Fact and Conclusions of Law.**

This case came on for hearing on the 20th day of December, 1915; the parties were represented by respective counsel and announced "ready for trial." The case was for trial on the complaint, answer and reply. Plaintiffs introduced evidence in their behalf and rested. Defendants introduced no evidence. Whereupon it was agreed in open court and

entered of record, that the jury heretofore empaneled in the cause might be discharged and the matter submitted to the Court for decision on the pleadings and the evidence. Whereupon the jury was discharged. Both sides then moved for judgment. The Court took the matter under advisement, and on the 3d day of January, 1916, rendered its opinion in favor of defendants, and directed findings to be presented accordingly.

And the Court does now hereby make, from the evidence and from the admissions in the pleadings, the following [184]

## FINDINGS OF FACT.

### I.

That on the 16th day of September, 1914, one Roy W. Nevin, as plaintiff, filed in the Superior Court of King County, Washington, his certain bill of complaint against the Pacific Coast & Norway Packing Company as defendant in which it was alleged (1) that said defendant was a Minnesota corporation, doing business in Washington and Alaska; (2) that said plaintiff was a creditor of said corporation to the amount of \$1,284; (3) that said corporation was in imminent danger of insolvency; which said complaint prayed for judgment against said corporation for \$1,284, and "for the appointment of a receiver of the property, assets and business of the defendant to control and manage the same and to continue the business of said corporation for the benefit of all its creditors."

### II.

That on the 16th day of September, 1914, said cor-



poration filed an answer in said suit, denying any indebtedness to the plaintiff therein, and praying "that the complaint herein be dismissed and for its costs and disbursements."

### III.

That thereafter, to wit, on September 16, 1914, in said court and cause, an order was passed and entered, in words and figures following, to wit; [185]

"Upon the verified complaint herein and after argument of counsel for the plaintiff and the defendant Pacific Coast & Norway Packing Company, it appearing to the Court that said defendant is in embarrassed financial circumstances and cannot meet its obligations as they mature; that suits have been begun against it and if its property is seized and sold at forced sale sufficient will not be realized to meet its obligations and that said defendant, though its assets now exceed its liabilities, is in imminent danger of insolvency.

IT IS HEREBY ORDERED that E. Schoenwald of Seattle, King County, Washington, be and he is hereby appointed receiver in this action of all the property, assets and business of the defendant upon his filing an undertaking executed to the State of Washington in the penal sum of \$20,000.00 with a sufficient surety to be approved by the court, conditioned for the faithful discharge of the duties of such receiver in the usual form.

IT IS FURTHER ORDERED that the said receiver be and he is hereby empowered to take possession of and to do all things necessary to the preservation of the property and assets of the defendant, and

continue the business of said defendant with full authority to do all things necessary thereto, until the further order of the court and shall from time to time report to the court his doings hereunder.

DONE in open court this September 16, 1914.

BOYD J. TALLMAN,  
Judge."

#### IV.

That on the 25th day of September, 1914, said Court did appoint S. T. Hills as coreceiver, and did by its order direct "that the receivers do forthwith take any necessary and proper steps to the end of extending this receivership without delay over property and assets of the defendant company located in the territory of Alaska, and its business operations therein." (Plaintiff's Exhibit "F.")

#### V.

That said Schoenwald and Hills, after having duly qualified as such receivers, came into immediate possession [186] of the following described property (among other property) of the said Pacific Coast & Norway Packing Company, to wit: the "Bernice," a gasoline power seine boat of the burden of 11 tons, her engine, tackle, equipment, machinery and furniture.

Said boat was then and there, and is now, of the value of \$2,000 and was then, and is now, situate in the territory of Alaska, and within the jurisdiction of this court, and was at said time and until long after the levy upon her of the attachment hereinafter referred to, licensed and documented in the United States Customs District for Alaska.

## VI.

That on, to wit, the 26th day of October, 1914, the said court did, in said cause, make and enter the following order :

“This matter coming on to be heard upon the application of E. Schoenwald and S. T. Hills as receivers of the Pacific Coast & Norway Packing Company for an order directing said company by its duly authorized officers to convey forthwith to said receivers all its real property in the territory of Alaska and to transfer to them all personalty there situated, C. O. Steberg, president of said company, being present and consenting to such order, and it appearing to the court that said conveyance and transfer is necessary to the successful conduct of the receivership.

IT IS HEREBY ORDERED, that the said Pacific Coast & Norway Packing Company convey to said receivers all its title to real estate situated in the territory of Alaska and transfer to said receivers all its personalty there situated, and said C. O. Steberg as president of said company is hereby directed to execute and deliver to said receivers a sufficient deed to said real estate and a bill of sale of said personalty.

Done in open court this October 26, 1914.

EVERETT SMITH,  
Judge.”

## VII.

That thereafter, to wit, on October 26, 1914, there was made and delivered to said receivers a certain instrument in writing, signed “Pacific Coast & Norway Packing Company, by [187] C. O. Steberg,

its President," to which was affixed the seal of said corporation; said instrument purported on its face to have been (and in fact it was) executed "pursuant to the order of the Superior Court of the State of Washington, in and for King County, this day made and entered in the case of Roy W. Nevin, plaintiff, vs. Pacific Coast & Norway Packing Company, defendant, No. 103,639 of said court," and purported on its face to "sell, transfer and set over unto E. Schoenwald and S. T. Hills, as receivers of the first party corporation and not otherwise" the said "Bernice," which said instrument was not placed of or on record in any office whatsoever until long after the levy of said attachment upon said "Bernice."

#### VIII.

That said corporation has not by any action of its governing board transferred or assigned said property to said Schoenwald and Hills, in any capacity or at all, nor at all ratified nor acquiesced in any such assignment, or in said receivership proceedings.

#### IX.

That on or about the 25th day of January, 1915, one D. N. McDonald (one of the defendants herein) was, and for a long time prior thereto had been, and is now, a resident of this Division of the territory of Alaska, and was and is now a creditor of said Pacific Coast & Norway Packing Company, being then and there the owner of two certain promissory notes, signed by the said Pacific Coast & Norway Packing Company, for \$1,404.89, which notes had been given by said corporation before it went into the hands of a receiver for a certain indebtedness accruing in the



District of Alaska to the said McDonald prior to the time of the said appointment of said [188] receivers, and that as said owner and holder said McDonald did, on said day, commence in this court an action against said Pacific Coast & Norway Packing Company for the recovery of the amount due on said notes; said action being the action mentioned in the pleadings herein.

### X.

That thereafter such proceedings were had in said action that said boat "Bernice," her engine, tackle, equipment, machinery and furniture, were duly and regularly attached by H. A. Bishop, U. S. Marshal for the First Division of Alaska (one of the defendants herein), and by him duly held as such marshal to satisfy such judgment, if any, as might be recovered in said action.

### XI.

That in said action said corporation Pacific Coast & Norway Packing Company, duly appeared and filed an answer, and such proceedings were had that on the 20th day of April, 1915, said McDonald duly and regularly recovered judgment against said corporation on said notes for \$1,404.89, interest, costs and attorney's fees; and in said judgment it was duly ordered that said "Bernice" be sold by said marshal to satisfy said judgment. [189]

### XII.

That at the time of the demand by plaintiffs herein upon said defendant Bishop for the possession of said vessel "Bernice," and at the time of filing this action of claim and delivery, said vessel "Bernice,"

her engine, tackle, equipment, machinery and furniture, were duly held by said defendant Bishop as United States Marshal under and by virtue of said writ of attachment and judgment in said action brought by defendant McDonald against the Pacific Coast & Norway Packing Company, and that three days after the commencement of this action the said "Bernice," her engine, tackle, equipment, machinery and furniture, were by virtue of the giving of a bond to said defendants by plaintiffs given and surrendered to plaintiffs, as by law provided.

XIII.

That defendant McDonald has not at any time been a party to, or in any manner acquiesced in or assented to, instigated, endorsed or ratified, or received any advantage or benefit whatsoever flowing from, said receivership and assignment, or either of them, and that neither of said defendants had any knowledge or notice, either actual or constructive, of the purported sale or assignment of said vessel "Bernice" to the plaintiffs until after the levy upon said vessel of the attachment in said action brought by defendant McDonald against the Pacific Coast & Norway Packing Company.

XIV.

That the plaintiffs have not been damaged by the defendants, or either of them, in any sum whatsoever.

And from the foregoing facts found, the Court deduces the following [190]

CONCLUSIONS OF LAW.

I.

That the receivership of Schoenwald and Hills was

an *in invitum* proceeding, and the said assignment to Schoenwald and Hills as receivers was an *in invitum* proceeding, and that both are in conflict with the rights of the defendant McDonald, a local creditor, and are against public policy, and have no extraterritorial effect, and should not be enforced in this territory.

## II.

That the possession by said defendant Bishop as United States Marshal of said vessel "Bernice," her engine, tackle, equipment, machinery and furniture, was rightful and according to law, and that the defendant McDonald has a valid lien upon said "Bernice," her engine, tackle, equipment, machinery and furniture, by virtue of the attachment and judgment in said action brought by him against said Pacific Coast & Norway Packing Company, and that the defendants are entitled to a judgment that plaintiffs take nothing by this action and that the said vessel "Bernice," her engine, tackle, equipment, machinery and furniture be returned and restored to the defendants, in order that the same may be held under said attachment and judgment in said action brought by said McDonald against said Pacific Coast & Norway Packing Company, or, if returned thereof cannot be had, then for judgment against the plaintiffs for the value of said boat, to wit: \$2,000.00; and for their costs and disbursements herein.

Made and entered in open Court this February 1, 1916.

ROBERT W. JENNINGS,  
Judge of the District Court.

Filed in the District Court, District of Alaska, First Division, Feb. 1, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [191]

BE IT FURTHER REMEMBERED that the plaintiffs thereupon filed their Motion for a New Trial as follows: [192]

*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS, and E. SCHOENWALD and S. T. HILLS, as Receivers and Assignees of the PACIFIC COAST AND NORWAY PACKING COMPANY, a Corporation,

Plaintiffs,

vs.

HARRY A. BISHOP, as United States Marshal for the First Division of the District of Alaska, and D. N. McDONALD,

Defendants.

**Motion for New Trial.**

Come now the above-named plaintiff, by their attorneys, Winn & Burton, and feeling themselves aggrieved, by the Findings of Fact and Conclusions of Law made, rendered and filed herein by the Court, move the court to set aside the following Findings of Fact and Conclusions of Law, and to grant a new trial herein upon the following grounds and for the following reasons:

I.

Finding of Fact No. VII, and especially all of that



portion of said Finding wherein it is stated that the deed of conveyance from the Pacific Coast & Norway Packing Company of its property to the receivers mentioned therein was made under and by virtue of the order referred to herein made by the Superior Court of the State of Washington for King County, for the reason that said Finding is not supported by any evidence in the case whatsoever but on the contrary the evidence shows that the transfer was voluntarily made by said corporation for the benefit of all of its creditors and not in pursuance of any order of the Court, or any law governing receiverships in the State of Washington but that the Court was simply asked [193] to ratify the free and voluntary act and deed of said corporation in the making of said conveyance, and that said Finding is against law.

## II.

Finding of Fact No. VIII for the reason that said Finding of Fact is not supported by any evidence in said cause, and is contrary to the evidence, and particularly there is no evidence to support the following portion of said Finding: "In any capacity or at all, nor at all ratified nor acquiesced in any such assignment, or in said receivership proceedings." On the contrary the undisputed evidence shows that the said corporation did ratify and acquiesce in the assignment made under the deed to the said Schoenwald and Hills, and did participate in the receivership proceedings, and that said Finding is against law.

## III.

Finding of Fact No. XIII for the reason that said

Finding is against the undisputed testimony and evidence in this cause and is not supported by any testimony and evidence, and is against law.

IV.

Conclusion of Law No. I for the reason there is no testimony or evidence in said cause to support said Conclusion of Law. In fact that said conclusion is contrary to all the evidence in said cause, and is against law.

V.

Conclusion of Law No. II for the reason there is no testimony or evidence in said cause to support said Conclusion of Law. In fact that said conclusion is contrary to all the evidence in said cause, and is against law.

WINN & BURTON,

Attorneys for Plaintiff.

Due service of the within Motion accepted this 3d day of February, A. D. 1916.

GUNNISON & ROBERTSON,

Attorneys for Defendants. [194]

Filed in the District Court, District of Alaska, First Division. Feb. 3, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

[Endorsed]: In the District Court for the Territory of Alaska, Division No. 1. E. Schoenwald et al., Plaintiffs, vs. Harry A. Bishop et al., Defendants. Motion for New Trial. Winn & Burton, Attorneys for Plaintiffs. Juneau, Alaska. [195]

BE IT FURTHER REMEMBERED that the court then entered its Order Denying the Motion for a New Trial, as follows: [196]

*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

No. 1264-A.

E. SCHOENWALD et al.,

vs.

HARRY A. BISHOP, etc., et al.

**Order Denying Motion for New Trial.**

Now at this time comes on regularly for hearing plaintiff's motion for a new trial herein, N. L. Burton, Esquire, appears in support of the motion, and R. E. Robertson, Esquire, in opposition thereto.

After hearing the argument of Mr. Burton, in support of the motion, the motion is denied.

ROBERT W. JENNINGS,

District Judge.

Monday, February 7, 1916. [197]

**Order Settling Bill of Exceptions.**

And now this matter coming on to be heard on the motion of the plaintiffs, asking that the above and foregoing be signed, settled and allowed as a Bill of Exceptions and made a part of the record herein, and that the Court certify that same contains all the evidence adduced and proceedings had, I, Robert W. Jennings, Judge of the United States District Court for Alaska, Division Number One, being the Judge before whom said cause was tried and said proceedings had, do hereby sign, settle and allow the

foregoing as a full, true and correct bill of exceptions herein, and order that the same be filed and made a part of the record herein; and I do further certify that the above and foregoing contains all the evidence adduced upon the trial of the above-entitled cause, together with copies of the exhibits introduced in said trial, to wit: Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I," "J," "K" and "L," and the findings of fact and conclusions of law filed and made herein and the Motion for New Trial filed herein, all of which are likewise made a part of the record herein; and I do further certify that said Bill of Exceptions was filed and presented, and settled and signed within the time allowed by law and the rules and practice of this court.

Signed in open court this 29th day of April, 1916.

ROBERT W. JENNINGS,

Judge. [198]

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*In the District Court for the District of Alaska,  
Division No. One, at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS, and E. SCHOENWALD & S. T. HILLS, as Receivers and Assignees of the PACIFIC COAST & NORWAY PACKING COMPANY, a Corporation,

Plaintiffs,

vs.

HARRY A. BISHOP as United States Marshal for the District of Alaska, Division Number One, and D. N. McDONALD,

Defendants.



**Memorandum Opinion. [199]****THE PLEADINGS.**

**COMPLAINT.** The complaint alleges in substances as follows:

Appointment September 16, 1914, by a Washington court, of S. T. Hills and E. Schoenwald, as receivers of the Pacific Coast and Norway Packing Company, a Minnesota corporation.

General assignment October 26, 1914, by said company to said Schoenwald and Hills, as receivers and assignees, of all the company's property in the Territory of Alaska (including the gasoline boat "Bernice") "voluntarily and of its own free will and accord"; which said boat was, and always (so far as material to this case) had been in the 1st Div. of Alaska.

Qualification of said Schoenwald and Hills, and immediate taking of possession of said boat by them.

Attachment by writ from Alaska Court January, 1915, of said boat by McDonald, who knew of and assented to said assignment.

**ANSWER.** The answer is substantially as follows: Denies all the material allegations of the complaint except the attachment; denies capacity of plaintiffs to sue; denies jurisdiction of this Court, and sets up the attachment, and alleges that McDonald is and was a resident creditor.

**THE EVIDENCE.**

The case was tried by *to* the Court without a jury, and at the conclusion of plaintiffs' case defendant rested, and both sides demanded judgment.

The evidence shows that the complaint, on which the receiver was appointed by the Washington Court, was one brought by Roy W. Nevin vs. Pacific Coast and Norway Packing Company, alleging that plaintiff in said cause was a creditor of the defendant corporation and that the said corporation "is financially embarrassed and cannot meet their obligations as [200] they mature. Suits have been begun against it, and if its property is seized at forced sale, sufficient cannot be realized to meet its obligations. Although defendant's assets now exceed its liabilities, said defendant is in immediate danger of insolvency." The prayer of said complaint being for the appointment of a receiver of the property, assets and business of the defendant to control and manage the same and to continue the business of said corporation for the benefit of all its creditors, and for judgment against said defendant in the amount of \$1,284.00, with plaintiff's costs and disbursements herein." (Plaintiffs' Exhibit "A.")

The evidence further shows that to this complaint an answer was filed by the defendant corporation denying the ownership by plaintiff therein of any claim against it, and praying "that the complaint herein be dismissed, and for its costs and disbursements herein." (Plaintiff's Exhibit "B.")

The evidence shows that in said cause the Washington Court made the following order:

*"Upon the verified complaint herein and after argument of counsel for the plaintiff and for the defendant, Pacific Coast and Norway Packing Company, it appearing to the Court that said defendant is in embarrassed financial*

circumstances and cannot meet its obligations as they mature; that suits have been begun against it, and if its property is seized and sold at forced sale, sufficient will not be realized to meet its obligation, and that said defendant, though its assets now exceed its liabilities, is in imminent danger of insolvency;

It is hereby ordered that E. Schoenwald, of Seattle, King County, Washington, be, and he is hereby, appointed receiver in this action of all the property, assets and business of the defendant, upon his filing an undertaking executed to the State of Washington in the penal sum of \$20,000, with a sufficient surety to be approved by the Court, conditioned for the faithful discharge of the duties of such receiver in the usual form.

It is further ordered that the said receiver be, and he is hereby, empowered to take possession of and to do all things necessary to the preservation of the property and assets of the defendant, and continue the business of said defendant, with full authority to do all things necessary thereto, until the further order of the Court, and shall from time to time report to the Court his doings hereunder.

Done in open court this September 16, 1914.

BOYD J. TALLMAN,

Judge."

(Plaintiffs' Exhibit "C.") [201]

The evidence further shows that immediately thereafter said Receiver qualified and took posses-

sion of said assets, and that Hills was afterwards appointed coreceiver, and duly qualified as such.

The evidence further shows that afterwards, to wit, on the 26th day of October, 1914, the said Court made an order directing the Company to execute a general assignment, and that the Company did so by a conveyance, reciting that it was executed "in pursuance of said order." (Plaintiffs' Exhibit "K.")

The evidence further shows that defendant McDonald was a creditor resident in Alaska (Cross-examination, deposition of Steberg, President), but it does not show that he knew that said assignment had been made or consented or acquiesced in the receivership and assignee proceedings, although it does appear that he had been informed that such an assignment was going to be made.

#### THE GIST OF THE CONTROVERSY.

It will thus be seen that the contest is as to the superiority of right between a foreign receiver and assignee in possession of the debtor's property in this Territory, and a local creditor attaching said property in the Courts of this Territory subsequent to the said appointment of said receiver-assignee.

Plaintiffs' position substantially, is this:

(1) That by comity they have a standing in this court;

(2) That by virtue of being assignees and vested with the title, they have a standing in this court;

Defendant controverts both contentions.

#### COMITY.

1. As to comity: It might be remarked in passing that such a Receivership as has here been con-



stituted by the Washington Court, to wit, a receivership to extricate from financial embarrassment and difficulties with creditors, a purely private, [202] solvent, corporation, is unknown to the Alaska law, although there seems to be a statute in the State of Washington authorizing such a proceeding.

I can see no occasion for the application here of the doctrine of comity. As said by Mr. Justice Day, in rendering the opinion of the Supreme Court in *Disconto v. Umbreit*, 208 U. S., on page 579:

“The doctrine of comity has been the subject of frequent discussion in the courts of this country when it has been sought to assert rights accruing under assignments for the benefit of creditors in other States as against the demands of local creditors by attachment or otherwise in the State where the property is situated. The cases were reviewed by Mr. Justice Brown, delivering the opinion of the Court in *Security Trust Co. vs. Dodd, Mead & Co.*, 173 U. S. 624, and the conclusion reached that voluntary assignments for the benefit of creditors should be given force in other States as to property therein situate, except so far as they come in conflict with the rights of local creditors, or with the public policy of the State in which it is sought to be enforced; and, as was said by Mr. Justice McLean, in *Oakey v. Bennett*, 11 How. 33, 44, ‘national comity does not require any government to give effect to such assignment (for the benefit of creditors) when it shall impair the remedies or lessen the securities of its own citizens.’ ”

2. Plaintiffs contend that—

(a) The assignment in question is a common-law assignment for the benefit of creditors;

(b) A common-law assignment for the benefit of creditors good where made is good everywhere.

It seems to be conceded that a safeguard for resident creditors exists in the case of foreign statutory assignments, but its existence in the case of a common-law assignment is denied.

In this connection, then, it is to be considered whether or not this is a common-law assignment.

NOT A COMMON-LAW ASSIGNMENT.

This Court cannot well see how it can be considered a common-law Assignment, when it is not shown to have been the act of the Company. No resolution of the Board of Directors authorizing the assignment is shown—nothing to show that it has ever been even discussed at any meeting, or that any meeting of the board was ever held for that purpose, nor that its making has ever been [203] ratified. Only this appears, that the president and some of the directors and the attorneys, have informally and individually agreed that the assignment ought to be made—that this would not be sufficient to validate an Assignment is well borne out by the authorities.

(2 R. C. L. p. 649: “Unless otherwise provided by statute, the general rule is, that a corporate assignment must be executed by the board of directors, or a quorum thereof, at a meeting duly called for that purpose, or be executed by an officer of the corporation, duly authorized by a resolution of the board of

directors. That consent of stockholders is entirely unnecessary. It seems that the action of the directors must be joint, and consequently an invalid assignment cannot be later validated by the ratification of a majority of the directors acting individually. It is universally held that the power to assign the property of a corporation is not incident to any corporate office, and an assignment made by any officer without being duly authorized by the board of directors is invalid, and this is true even when the officer assigning owns a large majority of the stock, and is in complete control of the corporation''; and cases cited in notes 5, 6, and 7, particularly Calumet Paper Co. vs. Haskell, 144 Mo. 331, 66 A. S. R. 425, where the Court say:

“Where a creditor elects to disregard the assignment and attaches the property of the corporation, and thereupon a contest arises between him and the assignee, the question is one which concerns the title of the assignee to the property, and it is properly drawn in question in such a proceeding; it is not a question where, in theory of law, the validity of the assignment is subject to collateral attack. But if it were, the rule would be the same; since such an assignment is not a judicial proceeding, and in every case where any person asserts rights under it as against a stranger, the burden is upon him to show at least an assignment valid on its face; and the other party may show that it was invalid by reason of extrinsic facts, as that it was unau-

thorized by a legal meeting of the directors”: 5 Thompson on Corporations, sec. 6478. When such an assignment has not been validated by acquiescence or laches, it may obviously be impeached, either by creditors or stockholders, on the ground that it was not made by the directors at a meeting duly convened, that is to say, on the ground that it was not made by the board of directors at all, for the acts of the directors are of no validity unless they are regularly assembled and acting as a board, and unless the proper quorum has concurred in the action which is challenged”: 5 Thompson on Corporations, sec. 6479.” Also *Doernbecher v. Columbia City Lumber Co.*, 21 Or. 573.)

In the case at bar there has not even been a resolution of ratification. [204]

## EFFECT OF THE TWO KINDS OF ASSIGNMENTS.

It cannot be denied that there is a substantial difference in the respective effects of the two kinds of assignments, but that difference seems to turn not so much upon the question of the rights of *resident* creditors thereunder, as upon the question as to whether or not there is any statute or policy in the given State forbidding or regulating such Assignments.

The Supreme Court of the United States, in *Security Trust Co. vs. Dodd, Mead & Co.*, 173 U. S. (624)—628—differentiates as follows:

“The operation of (voluntary or) common-law assignments upon property situated in other



States has been the subject of frequent discussion in the courts, and there is a general consensus of opinion to the effect that such assignments will be respected, except so far as they come in conflict with the *rights of local creditors*, or with the laws of public policy of the State in which the assignment is sought to be enforced. The cases in this court are not numerous, but they are all consonant with the above general principle. (Citing authorities.)

But the rule with respect to statutory assignments is somewhat different. While the authorities are not altogether harmonious, the prevailing American doctrine is that a conveyance under a state insolvent law operates only upon property within the territory of that State, and that with respect to property in other States it is given only such effect as the laws of such State permit; and that, in general, it must give *way to claims of creditors pursuing their remedies there*. It passes no title to real estate situated in another State. Nor, as to personal property, will the title acquired by it prevail against the rights of attaching creditors under the laws of the State where the property is actually situated. (Citing authorities.)”

According to this, the rights of local creditors are safe-guarded whether the assignment be a common-law assignment or a statutory assignment.

#### THE RECEIVERSHIP AND ASSIGNMENT ARE IN INVITUM.

It seems to the Court that whether the assignment

in question be called a common-law or a statutory assignment is not significant, unless the term "common-law assignment" be taken to mean the same as voluntary assignment, and the term "statutory assignment" is taken as synonymous with involuntary assignment, for the test is not the name of the assignment but its nature as [205] being *invitum* (voluntary) or *in invitum* (compulsory).

The conclusion arrived at is this, to wit: The receivership having been constituted in an adversary proceeding, (a suit by a creditor), is itself *in invitum*; The assignment having been made by the order of the Court in aid of this *in invitum* receivership is likewise *in invitum*. The order of the Court must be taken as the source of and authority for the assignment—certainly so, when that is the only authority shown. The fact that some, perhaps all, of the officers and attorneys of the corporation, were more or less agreeable to, or even instigated the receivership and assignment, is unimportant when it is considered that the order of the Court recites:

"This matter coming on to be heard upon the application of *E. Schoenwald and S. T. Hills as receivers* of the Pacific Coast and Norway Packing Company for an order directing said company by its duly authorized officers to convey forthwith to said receivers all its real property in the territory of Alaska, and to transfer to them all personalty there situated, C. O. Steberg, president of said company, being present and consenting to such order, and it appearing

to the court that said conveyance and transfer is necessary to the successful conduct of the receivership;

IT IS HEREBY ORDERED that the said Pacific Coast & Norway Packing Company convey to said receivers all its title to real estate situated in the territory of Alaska and transfer to said receivers all its personalty there situated, and said C. O. Steberg, as president of said company is hereby directed to execute and deliver to said receivers a sufficient deed to said real estate and a bill of sale of said personalty”;

and when it is further considered that the assignment purports on its face to have been executed “pursuant to the order of said court” in said cause and is particular to state that it is to Schoenwald and Hills “as receivers and not otherwise.” (Plaintiffs’ Exhibit “K.”)

A similar question arose in the case of *Huntington v. C. & O. Ry.*, reported in the 98 Fed. 459. In that case there was no prior Resolution of the Board of Directors, authorizing the assignment, although after the court had appointed a receiver and directed the transfer, and the transfer had been made, there was a resolution *ratifying* the assignment. But the Court held [206] that the assignment took its character from the action of the Court, not from the action of the Directors. The Court say, (p. 463):

“In form, the suit is adversary and involuntary, and it is not for this court to inquire whether the corporation was more or less willing or unwilling that the prayer of the com-

plaint should be granted. The plaintiff had appealed to the court, and, if he had a good cause of action, the relief must necessarily be granted, whether resisted by defendant or not. This fact, and the form of the suit, settles its character."

And speaking of the ratified assignment (p. 461-2):

"It was the evident purpose of the stockholders, as appears from the closing words of the resolution, to confirm the title of Zacher as receiver, and to quitclaim—every claim that the company might have to any remnant of ownership in any of its property, if the effect of the judgment appointing the receiver, with the powers and authority given him, had left any remaining. It does not seem to have been, nor in any way to have been intended to be, an independent assignment for the benefit of creditors. The resolution passed by the stockholders authorized nothing of the kind, *and the deed, itself, by its terms and by being executed to the receiver in his official capacity*, excludes any such idea as that it was executed as an original voluntary assignment for the benefit of the creditors of the company. It was executed *in aid of the receivership*." And concluding (p. 464):

"There having been in fact no voluntary assignment either made or authorized by the corporation for the benefit of creditors, but only an assignment, worked out through the opera-



tion of the judicial decree of the court in Connecticut under the statute of that State, it is precisely equivalent to a statutory assignment by the company under the insolvent laws of Connecticut regarding corporations.”

See, also, *Zacher v. Fidelity Trust and Safety Co.*, 59 S. W. 493, where the Court say, on page 495:

“The relief was sought by a stockholder and creditor. The corporation was made a defendant. The judgment, upon its face, did not purport to be a consent judgment, and this Court will not inquire whether the corporation itself instigated the granting of the relief sought by the creditor who instituted the suit. There was in fact no voluntary or common-law assignment, for the benefit of all the creditors equally made or authorized by the corporation, such as this Court has held to be binding upon creditors resident in this State. On the contrary, we think the proceeding in Connecticut was a statutory one for winding up the affairs of an insolvent corporation under the laws of that State, and is operative as to property in Kentucky only so far as the courts in this State choose to respect it, and that so far as appellant, as receiver or assignee, took title to such property, he took it subservient to appellee’s attachment.” [207]

On this point defendant cites the case of *Ward vs. Connecticut Pipe Company*, 41 Atl. 1057. It is true that the distinguished judge who rendered the

decision in that case held that the assignment was voluntary, although ordered by the Court. In that case, however, there had been a vote of the directors authorizing the assignment, and the receivership proceeding was by the shareholders themselves under a statute of Connecticut which "authorizes the Superior Court as a court of equity to wind up the affairs of any such corporation and to dissolve it *on the complaint of the shareholders.*" In the case at bar there is no evidence of any corporate action, and the receiver was appointed in an adversary proceeding—that is, at the suit of a creditor. Had the Connecticut case been similar to the case at bar, this language of Judge Baldwin would have governed, to wit:

"If the assignment by the defendant to the receiver had been forced upon it at the instance of a creditor, this might have been an *invitum* proceeding," citing *Catlin v. Silver Plate Co.*, 123 Ind. 477; 24 N. E. 250;

and then, too, this Connecticut case did not involve the rights of resident creditors.

The question here is as between a resident creditor and a foreign assignee, and the cases cited by plaintiff are, with one or two exceptions, cases between a foreign creditor and a foreign assignee, or the actual point decided in said cases is entirely foreign to the subject here under discussion, or the assignment was clearly not in *invitum*. For instance:

OLIVER v. CLARK, 106 Fed. 402: This was not a controversy wherein any rights of creditors

were involved. It was a suit in Texas about the title to land in Texas. Clark deraigned his title from a man by the name of Penniman; Clark was the receiver of the firm which had succeeded to Penniman's interest, and which claimed the land under a vendor's lien held by Penniman. Under the laws of Texas a vendee of land on which [208] there had been reserved a vendor's lien does not obtain the title; the title remains in the vendor—the vendee taking only an equitable interest (page 403, middle). The United States Court simply held that as Penniman was, under the laws of Texas, the legal owner, so also was his successor, the American Savings and Loan Association, for whom Clark was receiver, and who had acquired the land from Penniman (Clark also had a deed direct from Penniman), and that as such owner Clark was entitled to maintain his suit for the land which was his. The Court held (and certainly properly held) that the mere fact that the owner was also a receiver did not deprive him of the right to wage his suit for the protection of his title to the land.

Surely the courts of a State in which property is situated will not confer upon one person the property of another simply because the one is, and the other is not, a resident of that State; but a State may with propriety say to the foreigner owning property within its borders (which property is entitled to and receives the protection of the laws of the State)—“you have made agreements, done business, contracted debts and traded with our citizens on the strength of the availability of your property

to answer for your debts and obligations, and having so dealt with our citizens our courts will not recognize a decree of the courts of your domicile commanding you to remove those assets from this jurisdiction, or destroy their availability, or reduce our citizens to the expense and inconvenience of submitting their claims to a jurisdiction perhaps thousands of miles away and there proving them, for the first duty of a State is to its own citizens." There is nothing unjust or oppressive in this. [209]

MEYER v. HELLMAN, 91 U. S. 500: Simply holds that under the Bankruptcy Act of 1867 an Assignee in Bankruptcy cannot dispossess an assignee under a State insolvent law of property conveyed to him by an insolvent more than 4 months prior to the filing of the petition in bankruptcy. As the statutory assignment was "executed six months before the petition in bankruptcy was filed, it is to the assignee in bankruptcy a closed proceeding."

IN RE FARRELL, 176 Fed. 504, is exactly to the same effect as Meyer vs. Hellman. In fact it is said, "These decisions, especially the first (Meyer v. Hellman, *supra*) must rule the case at bar."

YOST v. GRAHAM, 40 S. E. 361 (W. Va.): This case holds that the law of the actual situs of personal property protects the claims of creditors domiciled there against transfers by operation of law and is, if anything, an authority against the citer.

WITTERS v. GLOBE BANK, 50 N. E. 932: This was a suit brought in Massachusetts by a creditor resident in Vermont, and the Court was particular



to limit its ruling to cases where no resident creditor was concerned, saying on page 933:

“Whatever may be true of such an assignment when credits of the assignor are attached here by inhabitants of Massachusetts, we perceive no good reason why we should protect, against the rights of the assignee, an attachment made by an inhabitant of Vermont after the assignment.”

PITTMAN v. MARQUATT, 50 N. E. 894 (Indiana): The controversy was in Indiana between a Kentucky assignee and an Illinois creditor.

ROBERTS v. NORCROSS, 45 Atl. 560, involved no rights of a local creditor. The assignee was a resident of Massachusetts, the attaching creditor was a resident of Maine. The forum was the New Hampshire court. [210]

CARTER BATTLE GROCER CO. v. JACKSON (Tex.), 45 S. W. 615. This seems to hold with the plaintiff.

MABON v. ONGLEY ELECTRIC CO., 50 N. E. 805 (N. Y.), simply decided that “A receiver of a foreign corporation appointed by a court of the foreign State cannot maintain an action in this State against such corporation as sole defendant, for the sole purpose of obtaining the appointment in this State of an ancillary receiver.” It is true that the court said by way of dictum, “If the title is by virtue of a voluntary conveyance or transfer, it is sustained as against all, including even domestic creditors”; but is also said by way of dictum, “but if

it (the assignment) depends on a foreign statute or *judgment*, it is sustained *against all except domestic creditors.*”

FENTON v. EDWARDS, 58 P. R. 320 (Cal.): This case, too, was one in which the rights of local creditors were not involved, and after reviewing various authorities, the opinion concludes as follows:

“The general rule is that a voluntary assignment of personal property, valid at the place where it is made, is valid everywhere and wherever the property may be situated, unless such transfer interferes with the domestic laws, policy, or rights of the citizens of the State in which the property is situate. Burrill, *Assignm.* (6th Ed.), p. 359, and cases cited in note 5.”

ATHERTON v. IVES, 20 Fed. 894 (Ky.), was a decision by a Circuit Court 32 years ago and cannot prevail over the latter decisions of the Kentucky Court and of the Supreme Court of the United States.

34 CYC. 493: If only the first paragraph is real it would appear to be an authority in favor of plaintiff, but in the light of the evidence in this case and of the section as a whole, the text is against the plaintiff. The section entire is as follows:

“The title of a receiver by virtue of a voluntary conveyance or assignment is sustained as against all, including even domestic creditors, and the receiver of a corporation which assigns to him all its property has a [211] right to

appeal and litigate for the protection of his claim as assignee; but rights of creditors to proceed in a State other than in which the receiver was appointed are not affected by involuntary assignments executed *under the orders of the appointing Court*, and such receiver will not be recognized to defeat the preference of such creditors."

WEIDER v. MADDOX (Tex.), 1 S. W. 168, refers to voluntary assignments only. The decision says, on p. 170:

"If it be an assignment under a compulsory statute, it exists alone by force of the law, which cannot operate extraterritorially. The law is compulsory if it requires the assignment to be made even at the request of creditors."

FIRST NAT. BANK v. WALKER, 23 Atl. 690 (Conn.), refers to voluntary assignments only.

### CONCLUSION.

This Court holding that the receivership and assignment were in *invitum*, likewise holds that neither one (or both) has any extraterritorial effect as against attaching resident creditors. On the latter holding the law is well settled. To even cite the numerous authorities on this point would fill pages of typewritten matter, and to review even a few of them would extend this opinion to an unconscionable length. Out of the many, I have selected the case of Catlin v. Wilcox Silver Plate Co., 24 N. E. 250 (Indiana, 1890), as being the fullest, most luminous and most nearly opposite; and because of

those facts and of the further fact that it is cited by the Supreme Court (*Security Trust Co. vs. Dodd, Mead & Co.*, 173 U. S. 624), and frequently by other courts, I quote from it somewhat at length.

There the facts were as follows: C and D of Chicago were indebted to X of Chicago, also to W of Connecticut; B of [212] Indiana was indebted to C and D; Catlin was receiver of C and D by appointment of the Chicago Court, and C and D assigned to Catlin by order of said court. Subsequent to said assignment, W in Indiana Court attached property in Indiana—Catlin asserted superior right as receiver and assignee—The question was: “Are the rights of nonresident attaching creditors in Indiana courts to property in Indiana paramount to those of the receiver (and assignee) appointed by the Chicago court prior to the issuance of the attachment?” The Court answered in the affirmative.—It will be noted that that was a controversy between nonresidents of Indiana, while the case at bar is between a resident and a nonresident. It would seem therefore that the Indiana court would have rendered a more emphatic affirmative had the case before it been exactly like this. Says that Court in that case:

“While it has been held that a court may appoint a receiver and authorize him to take possession of property in a foreign jurisdiction, the doctrine is universal that the appointment confers no legal authority which the receiver can exert over the property without the aid of the courts in whose jurisdiction it



is found. The appointment, of its own force, gives him the right to take possession of the property; but it confers upon him no power to compel the recognition of that right outside of the jurisdiction of the court making the appointment. High, Rec., secs. 47, 241. While there are authorities of great weight which seem to hold that a receiver appointed in one jurisdiction will not be permitted to maintain a suit in a foreign state, the generally prevailing doctrine, upon which all the decisions seem to be harmonious, is that, upon the principles of comity the courts of the jurisdiction in which the property or fund is situate will recognize the rights of the receiver so far as to aid him in reducing it to possession, unless to do so would in some way violate the local policy, or interfere with the rights of resident creditors. *Metzner v. Bauer*, 98 Ind. 425, and cases cited; Beach, Rec., secs. 16-19, 682; *Bank v. McLeod*, 38 Ohio St. 174. But the recognition of well-established principles of comity and courtesy between courts of different jurisdiction is one thing, while the rights of resident or other attaching creditors, who are seeking to avail themselves of legal proceedings, authorized by statutes of the state, for the appropriation of a fund belonging to a nonresident debtor, must be determined upon altogether different principles. As has, in effect, been said, courts are prepared to extend comity where there is no reason to the contrary, especially if there is no

interest of their own citizens, or of the citizens of another state who are asking the protection of their laws, injuriously affected by such recognition. *Paine v. Lester*, 44 Conn. 196; *Milne v. Moreton*, 6 Bin. 361. The rule may be considered as established that a receiver may invoke the aid of a foreign court in obtaining possession of property [213] or funds within its jurisdiction to which he is entitled, but aid will only be extended as against those who were parties, or in some way in privity with the proceedings, in the court in which his appointment was made, or who are in possession of the property or fund to which the receiver has a right, and not against creditors of a nonresident debtor who are seeking to subject the property or fund to the payment of their debts by proceedings duly instituted for that purpose. Accordingly, in *Hurd v. City of Elizabeth*, 41 N. J. Law, 1, the Court said: 'That the officers of a foreign court should not be permitted, as against the claims of creditors resident here, to remove from this State the assets of the debtor, is a proposition that appears to be asserted by all the decisions.' The principle upon which the decisions rest is that it is the policy of the government to retain within its control the property of a foreign debtor until all domestic claims have been satisfied, and hence the right of the receiver of a foreign court to sue, which is allowed only upon considerations of comity, will be denied when it

comes in conflict with the interests of domestic creditors. 'We decline,' said the court in *Runk v. St. John*, 29 Barb. 585, 'to extend our wonted courtesy so far as to work detriment to citizens of our own state who have been induced to give credit to the foreign insolvent.' *Bagley v. Railroad Co.*, 86 Pa. St. 291; *Insurance Co. v. Wright*, 55 Vt. 526; *Thurston v. Rosenfield*, 42 Mo. 474; *Willitts v. Waite*, 25 N. Y. 577. It follows, hence, that the available legal authority of a receiver is co-extensive only with the jurisdiction of the court by which he was appointed, when the right of precedence or priority of creditors is asserted in respect to property or funds of a non-resident debtor, which the receiver has not yet induced to possession. *Hunt v. Insurance Co.*, 55 Me. 290; *Warren v. Bank*, 7 Phila. 156; *Booth v. Clark*, 17 How. 322; *State v. Railroad Co.*, 15 Fla. 202; *Insurance Co. v. Needles*, 52 Mo. 17; *Taylor v. Insurance Co.*, 14 Allen, 353.

It is said, however, that, as *Clapp & Davies* were residents of the state of Illinois at the time the receiver was appointed, the debt due them from *Bagley & Oberreich* was within the jurisdiction of the Superior Court of Cook county, upon the principle that the domicile draws to it the personal property and choses in action of the owner, wherever they may be situated. Hence the contention is that, as the appointment of the appellant as receiver was followed by a general deed of assignment, valid in

the state of Illinois, it must be regarded as valid here, and as divesting Clapp & Davies of all title or interest in the debt in controversy after the date of the assignment. It is, of course, well settled that personal property is transferrable according to the law of the owner's domicile, and that a voluntary assignment or transfer, made without compulsion or legal coercion, is to be governed everywhere by that law, unless the contract by which the transfer was made is limited or restrained by some policy or positive enactment of the state in which the property is situate, or unless it affects the citizens of the latter state injuriously. *Iron Works v. Warren*, 76 Ind. 512; *Martin v. Potter*, 11 Gray, 37; *Weider v. Maddox*, 66 Tex. 372; 1 S. W. Rep. 168; *Warner v. Jaffray*, 96 N. Y. 248; *Green v. Van Buskirk*, 7 Wall, 150; *Askew v. Bank*, 83 Mo. 366; *Law v. Mills*, 18 Pa. St. 185; *Burrill*, Assignm. sec. 301; *Story*, Confl. Laws, secs. 383-390. 'The voluntary transfer of a chattel by the debtor, if it be not forbidden in other respects by the law at the place of situs, is to be as much regarded there or elsewhere as it would be at the place of the domicile.' *Lowry v. Hall*, 2 Watts & S. 131; *Smith's Appeal*, 104 Pa. St. 381; [214] *Chafee v. Bank*, 71 Me. 514. Such an assignment will not be upheld, however, if it contravenes the policy of the law of the place where the property is situate. *Guillander v. Howell*, 35 N. Y. 657; *Faulkner v. Hyman*, 142 Mass. 53, 6 N. E. Rep.



846; *Moore v. Church*, 70 Iowa, 208, 30 N. W. Rep. 855; *In re Waite*, 99 N. Y. 433, 2 N. E. Rep. 440.

The principals above stated are applicable only to transfer or assignments of property which rest essentially on contract, and are voluntary in the sense that they are the product of a will acting without legal compulsion. Property in a foreign state that has passed from an assignor to an assignee by a voluntary deed, and not by proceedings *in invitum*, by process of law, is distinguished from like property in the hands of a receiver by operation of law, or by an assignment made under legal compulsion. Assignments of the latter class are held inoperative upon property not situate within the territory over which the laws that make, or compel, the debtor to make, them have dominion. *Rhawn v. Pearce*, 110 Ill. 350; *Smith's Appeal*, 104 Pa. St. 381; *Weider v. Maddox*, *supra*. Involuntary assignments which are made under foreign insolvent laws have no operation outside of the state under whose laws they were made, while a voluntary assignment is a personal, common-law right, possessed by every owner of property, and may operate in one state as well as another. *Walters v. Whitlock*, 9 Fla. 86.

Some conflict or contrariety of opinion may be found in the decisions in respect to what may or may not constitute a voluntary assignment

under the statutes of different states; but it is unnecessary to enter upon a discussion of the cases relating to voluntary assignments, as all the authorities agree that where an assignment is made under compulsion of law, or where property is taken *in invitum*, the transfer will not be regarded as voluntary, nor will it be effectual beyond the jurisdiction in which it was made, when it conflicts with the interests of citizens in a foreign jurisdiction. As we have seen, a court cannot extend its jurisdiction by the appointment of a receiver. So it is equally powerless to do so by coercing an assignment of the property in controversy. An assignment is regarded merely as a matter of convenience, in aid of the jurisdiction of the court; the established doctrine being that as against non-resident creditors the assignment confers no additional or higher right to the property than the receiver had by virtue of his appointment. *Iddings v. Bruen*, 4 Sandf. Ch. 252; High, Rec. 443.

While it is true, as has been remarked before, the domicile of the owner, in legal contemplation, draws to it his personal estate wherever it may be, yet, as this is so only by fiction of law, the rule is not of universal application. When, by the law and policy of the state where the property is actually located, it is subject to the process of attachment or garnishment at the suit of a domestic or other creditor, the fiction yields, and the actual situs of the property determines

whether or not it should be subjected to the process of the court. Warner v. Jaffray, *supra*; Green v. Van Buskirk, *supra*. In cases of attachment and garnishment, like those for founding administration, the situs of a debt is the residence of the debtor. Wyman v. Halstead, 109 U. S. 654, 3 Sup. Ct. Rep. 417; Owen v. Miller, 10 Ohio St. 136."

### POSSESSION.

I cannot see how the fact that the receiver—assignee took possession prior to the attachment can alter the case. [215]

"The true principle is that the assignees in an assignment *in invitum* are on no other or better footing than the bankrupt himself in regard to property or assets in other jurisdictions. They take subject to every equity and subject to the remedies, provided by the laws of the foreign jurisdiction, and when permitted to sue therein it is not as assignees having an interest but as representatives of the assignor."

(2 R. C. L. sec. 42, page 688, and cases cited.)

### SILENCE OF ATTORNEY AS ASSENT.

Nor can I believe that the fact, that the attorney for McDonald was informed that the company intended to convey to the Receiver and expressed no dissent, at all affects Mr. McDonald's rights. There is no evidence that the making of the Assignment was at all induced by any thing done or omitted by McDonald or his attorney—neither McDonald nor his attorney assented to the proposed assignment.

There was no call upon either to speak. They were dealing at arms length with the corporation and all its creditors who were not as favorably situated as McDonald was. As well or better might it be contended that McDonald ratified and consented to be bound by the foreign receivership because his attorney had knowledge of it as a *fait accompli*, as to contend that McDonald assented to the foreign assignment to be made *in futuro*, because his attorney learned that it was the design of his adversary to make such assignment—Is one to be penalized, by being made to forego an existing superiority of position, simply because a knowledge of the plans of his adversary has been thrust upon him or his attorney by his adversary's attorney? To ask the question is to answer it. The knowledge of this proposed assignment has conferred no benefit on McDonald which he would not have otherwise had, nor has it in any way contributed to cause the disadvantage of which the corporation or other creditors were under (by reason of their location and circumstances) to be at all increased. [216]

#### LACHES.

There is no evidence that when the Assignment was finally made, either McDonald or his attorney had any knowledge, either actual or constructive, of the fact that it had been made. The Assignment of the property in question was not placed on record in Alaska; although the Assignment of the real estate was recorded on October 30, 1914, in the proper district. The Assignment was made at Seattle on the 26th of October, 1914, and the attachment was in



Alaska in January, 1915. Surely McDonald did not wait an unreasonable time before asserting his rights—laches will not be attributed to him for only two or three months delay. It is not shown that he has at all participated in or accepted any benefits from the Receivership or the Assignment, or in any way misled his adversaries to the latter's disadvantage.

The findings and judgment will have to be for the defendant.

Filed in the District Court, District of Alaska, First Division. Jan. 6, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [217]

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*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

No. 1264-A.

E. SCHOENWALD and S. T. HILLS, and E. SCHOENWALD and S. T. HILLS as Receivers and Assignees of the PACIFIC COAST & NORWAY PACKING COMPANY, a Corporation,

Plaintiffs,

vs.

HARRY A. BISHOP, as United States Marshal for the First Division of the District of Alaska, and D. N. McDONALD,

Defendants.

**Praeceptum for Transcript of Record.**

To the Clerk of the Above-entitled Court:

Please prepare transcript in the above-entitled

cause on Writ of Error, consisting of the following papers, viz.:

1. Complaint.
2. Answer.
3. Motion of Plaintiffs to Strike from Answer.
4. Demurrer to Answer.
5. Order Ruling on above Motion and Demurrer,  
dated Dec. 20/15.
6. Reply.
7. Order, with consent of parties, Discharging  
Jury at the end of the introduction of the  
evidence.
8. Findings of Fact and Conclusions of Law  
offered by plaintiff.
9. Order of Court denying proposed Findings of  
Fact and Conclusions of Law of Plaintiff.
10. Findings of Fact and Conclusions of Law  
offered by the Court.
11. Judgment.
12. Motion for New Trial and order denying same.
13. Order extending time to file Bill of Exceptions.  
[218]
14. Assignments of Error.
15. Petition for Writ of Error.
16. Order approving amount of Bond on Writ of  
Error.
17. Bond on Writ of Error.
18. Writ of Error, and allowing of same by Court.
19. Citation on Writ of Error.
20. Bill of Exceptions to be settled and allowed  
by the Court.

21. Opinion of Court.

And this praecipe.

WINN & BURTON,

Attorneys for Plaintiff. [219]

Filed in the District Court, District of Alaska,  
First Division. Mar. 7, 1916.

J. W. BELL,

Clerk.

By L. E. Spacy,

Deputy. [220]

[Endorsed]: No. 1264-A. In the District Court for the Territory of Alaska, Division No. 1. *E. Schoenwald and S. T. Hills and E. Schoenwald and S. T. Hills as Receivers, etc., Plaintiffs, vs. Harry A. Bishop, as U. S. Marshal for the First Division of the District of Alaska, and D. N. McDonald, Defendants. Praecipe.*

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*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

United States of America,

District of Alaska,

Division No. 1,—ss.

**Certificate of Clerk U. S. District Court to  
Transcript of Record.**

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 220 pages of typewritten matter, numbered from 1 to 220, both inclusive, constitute a full, true, and complete copy,

and the whole thereof, prepared in accordance with the praecipe of plaintiffs and plaintiffs in error, on file in my office and made a part hereof, in Cause No. 1264-A, wherein E. Schoenwald and S. T. Hills and E. Schoenwald and S. T. Hills, as receiver and assignees of the Pacific Coast and Norway Packing Company, a corporation, are plaintiffs and plaintiffs in error, vs. Harry A. Bishop, as United States Marshal for the District of Alaska, Division Number One, and D. N. McDonald, defendants and defendants in error.

I further certify that the said record is by virtue of the Writ of Error and Citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and the cost of preparation, examination and certificate, amounting to Ninety-nine and 75/100 Dollars (\$99.75), has been paid to me by counsel for plaintiff in error.

In WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled Court this 8th day of June, 1916.

[Seal]

J. W. BELL,  
Clerk.

By \_\_\_\_\_,  
Deputy.



[Endorsed]: No. 2817. United States Circuit Court of Appeals for the Ninth Circuit. E. Schoenwald and S. T. Hills as Receivers and Assignees of the Pacific Coast & Norway Packing Company, a Corporation, Plaintiffs in Error, vs. Harry A. Bishop, as United States Marshal for the First Division of the District of Alaska, and D. N. McDonald, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed June 19, 1916.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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E. SCHOENWALD and S. T.  
HILLS as Receiver and As-  
signees of the Pacific Coast &  
Norway Packing Company, a  
corporation,

*Plaintiffs in Error;*

*vs.*

HARRY A. BISHOP, as  
United States Marshal for the  
first division of the district of  
Alaska, and D. N. McDON-  
ALD,

*Defendants in Error.*

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UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT OF THE DIS-  
TRICT OF ALASKA, DIVISION NO. 1.

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**Brief of Plaintiffs in Error**

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WINFIELD R. SMITH and  
WINN & BURTON,

*Attorneys for Plaintiffs in Error.*

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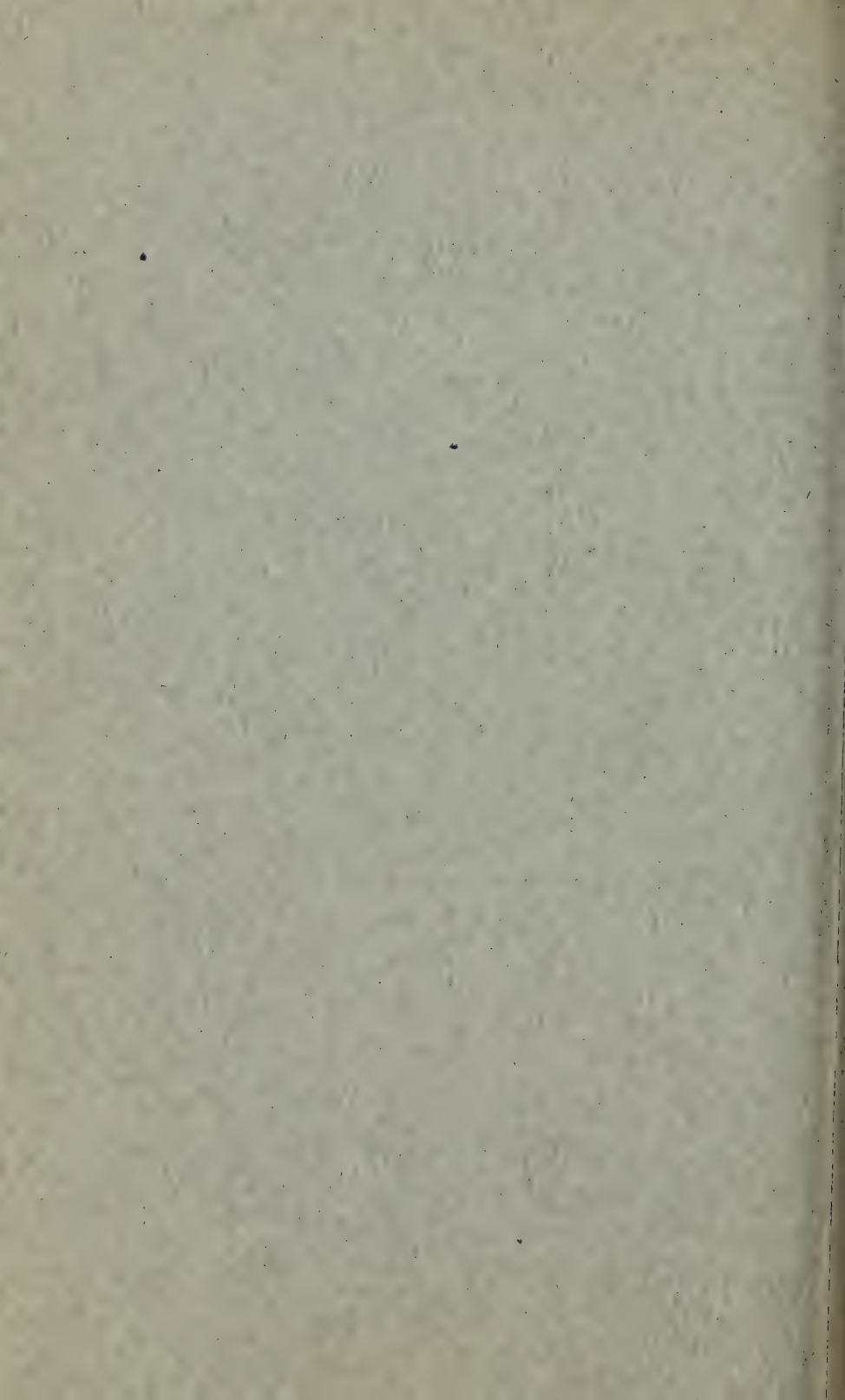
**Filed**

**OCT 13 1916**

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Gateway Printing Company, Collins Building, Seattle

**F. D. Monckton,**  
**Clerk,**



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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E. SCHOENWALD and S. T.  
HILLS as Receiver and As-  
signees of the Pacific Coast &  
Norway Packing Company, a  
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*Plaintiffs in Error,*

*vs.*

HARRY A. BISHOP, as  
United States Marshal for the  
first division of the district of  
Alaska, and D. N. McDON-  
ALD,

*Defendants in Error.*

---

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT OF THE DIS-  
TRICT OF ALASKA, DIVISION NO. 1.

---

**Brief of Plaintiffs in Error**

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STATEMENT OF CASE.

In this case there is no essential issue of fact. When the plaintiffs presented their evidence defendants announced they would offer none, they deeming that only questions of law were involved. (Rec. p. 176.)



Pacific Coast & Norway Packing Company is a Minnesota corporation actually operating in Washington and Alaska. Its business affairs practically all centered at Seattle. In September, 1914, the company faced a financial crisis. Its bank account and much of its salmon pack were tied up by garnishments. Rumors had spread that part of its pack had spoiled, and a number of suits threatened. Although the company's assets were valued largely in excess of its liabilities, it was unable to meet its current obligations. The officers and directors and principal creditors and stockholders concurred in desiring to secure all the creditors equally and conserve the assets, and it was decided that a receivership would best serve the purpose (rec. p. 66). A friendly suit was accordingly arranged (p. 83), and a complaint by a creditor asking that a receiver be appointed and an answer by the company virtually admitting the petition were prepared. Both were filed at the same time—September 16, 1914. (Rec. pp. 177, 179.) Immediately an order was entered appointing the receiver, both parties attending for this purpose. Although the proceeding was in strict form adversary, in fact the company voluntarily adopted this means of turning over its assets to its creditors (pp. 66, 83). This fact is of far reaching importance.

Subsequently an advisory receiver was appointed and likewise immediately qualified (p. 186). Immediately upon appointment the receiver took

possession of all the company's assets both in Washington and Alaska, and assumed control of all its business, the company voluntarily turning over the assets in Alaska to the end that the receivers should have full control to do the best for all the creditors (pp. 67, 93, 152). Although the receivers thus had actual possession and control of the Alaska assets, yet legally the receivership of course extended only to the limits of Washington—either the receivership must be extended over Alaska by ancillary proceedings or a common law transfer of the Alaska assets be made for the benefit of the creditors. Proceedings were begun in the Alaska court to extend the receivership, but it was subsequently decided to transfer the assets instead for the creditors. The directors and stockholders favored this and stood ready to make the necessary instruments of transfer. It was obviously in order to make the Washington receivers trustees of the Alaska assets also, and to obtain first the approval of the Washington court to its receivers taking title to the Alaska assets and undertaking their distribution. Therefore, after the plan had been fully worked out by the company and the receivers, and while the deed and bill of sale were being prepared, the active receiver Mr. Schoenwald together with the president of the company went before the Washington court and obtained an order in the premises. Although in form this directs the company to make the conveyance and the transfer, it was only an approval of what had already been agreed upon and

was in process of execution (rec. p. 76, ans. to cross-int. 9). The court signed the order only when assured by the president that the company desired the transfer of the Alaska assets to the receivers. (Rec. pp. 69, 70, 84, 94-96, 98, 154). As a matter of fact, therefore, the company did not make the transfer because of the order, but the order was simply by way of approval of its receivers' part in what the company was then doing entirely of its own motion (rec. pp. 75, 76, 84, 87, 95, 155). The transfer was not made under or with reference to any statute of the state of Washington (rec. pp. 73, 99).

The receivers thus took title October 26, 1914. In January, 1915, the defendant McDonald, one of the few Alaska creditors of the company, began an action against it on two promissory notes and attached the gasoline boat "Bernice" as the property of the company. This boat had been expressly included in the transfer to Schoenwald and Hills, the receivers, and this action in replevin was instituted by Schoenwald and Hills accordingly. Trial was begun before a jury but the parties afterwards stipulated that the jury might be discharged and decision be rendered by the court alone (rec. p. 176). The court took the case under advisement and later filed a written opinion directing judgment for the defendant (rec. pp. 226, 254); findings, conclusions and judgment were entered accordingly, and plaintiffs sued out this writ of error.

The question therefore is whether the transfer of the "Bernice" to Schoenwald and Hills is good as against the attaching creditor McDonald, and this at bottom, we submit, depends upon whether the transfer was a voluntary common law assignment or was an involuntary or statutory assignment. If the former, as we contend, then it is good everywhere, and the judgment of the lower court should be reversed.

### ERRORS RELIED ON.

1. The court erred in refusing to make finding of fact No. II offered by plaintiffs in error, which reads as follows:

"That the appointment of said plaintiffs, Schoenwald and Hills as receivers of said Pacific Coast & Norway Packing Company was voluntary on the part of said Pacific Coast & Norway Packing Company and at the suggestion and with the acquiescence, assistance and consent of said company and was done solely for the purpose of preserving and keeping intact the property and assets of said company and preventing forced sales thereof by reason of certain suits which had been brought, or were being threatened, and such appointment of said receivers was in order to secure equality among the creditors of the company; that at the time of the appointment of said plaintiffs as receivers, as aforesaid, the assets of said Pacific Coast & Norway Packing Company exceeded the liabilities, but such assets could not at said time be realized upon, and in order to protect and preserve the same it was deemed wise to have such receivers appointed to protect all the creditors alike, as aforesaid."



2. The court erred in refusing to make proposed finding of fact No. III, as follows:

“That on, towit, the 26th day of October, 1914, the said Pacific Coast & Norway Packing Company to further protect all the creditors alike and avoid the expense and occasion of appointing ancillary receivers in Alaska, and for the sake of efficient, economic and unified administration of the assets of said Pacific Coast & Norway Packing Company, to the benefit of all the creditors alike, voluntarily and of its own free will and accord, conveyed all of its property, both real and personal, to the said E. Schoenwald and S. T. Hills in trust for the benefit of all creditors of said corporation; the real estate being conveyed by deed and the personal property, including the gasoline boat, “Bernice,” by bill of sale, and the said Schoenwald and Hills immediately thereafter took possession of all of such personal property, including the said gasoline boat, “Bernice.”

3. The court erroneously refused to make proposed finding of fact No. VI, which reads as follows:

“That every trustee or director and all the stockholders of the Pacific Coast & Norway Packing Company desired, approved and ratified giving the said conveyance to said Schoenwald and Hills as trustees aforesaid, conveying the title to the Alaska assets, and approved the execution of the instruments transferring such assets to said E. Schoenwald and S. T. Hills as trustees; that this approval was not by a formal meeting of the stockholders, but was obtained by Mr. Schoenwald, one of the receivers, communicating with the great majority of the stockholders, and personally conferring with the rest of them; that the consent and approval of all

the directors, as well as all of the stockholders, to the execution of the instruments transferring the legal title of the Alaska assets to the receivers was obtained in the manner aforesaid."

4. The court erred in not making proposed finding of fact No. VIII as follows:

"That the transfer of the assets by said Pacific Coast & Norway Packing Company to E. Schoenwald and S. T. Hills was not made under and by virtue of any Washington statute, or any statute, or by compulsion of law, but the instruments were prepared and executed voluntarily by said company with a view of passing legal title to the said trustees in accordance with the principles of common law, and for the benefit of all the creditors of said corporation alike."

5. The court erroneously refused to make requested conclusions of law numbered I, II, III, IV, and V (rec. pp. 209-211), which in substance were that the transfer of assets to the plaintiffs was a common law assignment, freely executed and consented to by all the directors and stockholders of the company; that the transfer was not under any statute or under compulsion of law, and constituted plaintiffs owners of the assets, which therefore were not subject to subsequent attachment as the company's property.

6. The court erred in making finding of fact No. VII, and especially that portion thereof referring to the bill of sale which reads as follows: "Said instrument in fact was executed 'pursuant to the

order of the superior court of the state of Washington in and for King County'."

7. The court erred in making finding of fact No. VIII reading as follows:

"That said corporation has not by any action of its governing board transferred or assigned said property to said Schoenwald and Hills, in any capacity or at all, nor at all ratified nor acquiesced in any such assignment, or in said receivership proceedings."

8. The court erred in making conclusions of law numbered I and II, which are substantially that the assignment to the plaintiffs of the Alaska assets was *in iuribus* and had no extraterritorial effect, and that the possession by the defendants was therefore rightful and the attached property should be returned to them.

9. The court erred in rendering judgment for the defendants.

We think the court erred also in the exclusion of testimony (see assignment of errors, rec. pp. 33-46) but since there is ample evidence before the court to sustain our contention we waive the further errors assigned on these points.

## ARGUMENT.

Upon final analysis we contend that the court in its decision fell into three fundamental errors, that is, it was error to hold

(1) that the transfer was not shown to be the act of the company;

(2) that the transfer to the plaintiffs in error was involuntary; and

(3) that even if voluntary the assignment was yet invalid as against subsequent attachments by Alaska creditors. Our contention on the contrary is that the Pacific Coast & Norway Packing Company in fact made a voluntary assignment of its Alaska assets to the plaintiffs in error for the equal benefit of all creditors, and that that assignment carried title against Alaska creditors as well as others.

## I.

*The transfer was the act of the company.*

The district court held that the transfer was not shown to be the company's act. Says the opinion:

“No resolution of the board of directors authorizing the assignment is shown—nothing to show that it has ever been even discussed at any meeting, or that any meeting of the board was ever held for that purpose, nor that its making has ever been ratified. Only this appears, that the president and some of the directors and the attorneys have informally and individually agreed that the assignment ought to be made—that this would not be sufficient to validate an assignment is well borne out by the authorities.” (Rec. p. 231.)

The last sentence quoted is the one and only reference in the entire opinion of 30 printed pages to



the convincing testimony of four witnesses—Schoenwald, receiver, Steberg, president of the company, and Kells and Smith, attorneys, all speaking from knowledge and bearing out that the directors, stockholders and the leading creditors all favored the transfer of the Alaska assets, and that afterwards literally all of the stockholders and directors acquiesced in and expressly approved this transfer (rec. pp. 69-70, 84, 96). For example, Mr. Schoenwald himself talked with all the directors, and all the stockholders either in person or (in the case of a few small stockholders) through their authorized representatives (rec. p. 154).

This, we submit, especially well brings home the fundamental weakness of the decision. It rests upon narrow, technical application of rules of law, which really do not fit the actual situation at all. The court overlooked all of this testimony in the case, disregarded the recital that the transfer was voluntary and saw nothing but a few recitals here and there in the written instruments, which taken alone are inaccurate.

Proceeding now to the point that the transfer of the Alaska assets is the act of the company. The deed and bill of sale were both executed in the name of the company by its president under the company seal. They would at most be merely voidable by the company, and nobody ever thought of setting them aside. Instead, as stated, the directors and stockholders have all consented and acquiesced, and

this cured any irregularity in the corporate procedure. A further answer to the court's position is that a creditor has no concern with the management of the corporation's internal affairs, and therefore cannot raise the question whether its procedure is regular or irregular. Of course fraud might vitiate whether the transfer is regular or irregular, but no question of fraud arises here. On the contrary all the evidence makes clear that the purpose of the transfer was to assure fairness and equality to all the creditors.

The authorities establishing these propositions in our favor are numerous and well considered. The transfer here was made in the state of Washington where the company's business centered, and the supreme court of that state has decided this very question in our favor on the grounds both of acquiescence and that a creditor is concluded. We refer to the case of *Roy & Co. v. Scott, Hartley & Co.*, 11 Wash. 399. On the point of acquiescence the court says:

“While it may be true as a proposition of law that a minority of the stockholders may attack and rescind a contract made without authority of the corporation \* \* \* acquiescence in such contract estops.”

There, as here, the stockholders all acquiesced. As to the point of the creditor not being in position to object, the court says:

“Assuming that the transaction was one that could be repudiated without any showing of

fraud or injury, it would still be voidable merely, and not void, and the right to avoid it would belong only to persons who had an interest in the property before the transfer, and no other person has the right to question it or set the sale aside," citing authorities (p. 404.)

In the case at bar the defendant McDonald has only his attachment lien, and that was acquired months after the transfer of title to the plaintiffs.

In the case of *Marsters v. Oil Co.*, 90 Pac. (Ore.) 151, a mortgage foreclosure, a creditor claimed the mortgage invalid because not authorized at a duly held meeting of directors. Said the court referring to irregularities in the execution of instruments:

"Such transactions however \* \* \* are only voidable at the instance of the corporation or its stockholders. The corporation or its stockholders may, like an individual, elect to confirm a transaction which could have been repudiated \* \* \* and if the transaction is acquiesced in by the corporation and its stockholders it becomes as valid and binding as if regularly authorized. A creditor does not, in this respect, stand in the position of the corporation or a stockholder, and he is not entitled to exercise the rights of either \* \* \*. His right to question a transaction of this character, which has not been repudiated or disaffirmed by the corporation or a stockholder, depends upon its fraudulent character, and not whether it was regularly authorized in the first instance. If it was in fact fair and honest and not intended to hinder, delay, or defraud creditors, it cannot be attacked by him," citing leading authorities (p. 153).

*Morisette v. Howard*, 63 Pac. (Kans.) 756, is essentially like the case at bar in its facts. There attaching creditors showed that there had been no meeting of the directors authorizing the sale. Said the court—p. 757:

“There was an individual assent of the directors reported to be present at a meeting, and there was also the acquiescence and assent of the stockholders or those representing them. The act which they undertook to perform was within the power of the corporation. It was informally done, but the informality was cured by the ratification of the stockholders.”

So the facts in *Miller v. Matthews*, 40 Atl. (Md.) 176, are essentially like ours. The corporation there made an assignment for the benefit of creditors which had been authorized by only two of its five directors. The other directors and the stockholders however acquiesced later, just as here. On page 178 the court marshals numerous authorities holding that this is full validation. The court follows *Stokes v. Detrick*, 23 Atl. (Md.) 848, in approving *Kelsey v. Bank*, 69 Pa. St. 429, where it is said:

“The law is well settled that a principal who neglects promptly to disavow the act of his agent, by which the latter has transcended his authority, makes the act his own; and the maxim which makes ratification the equivalent of a precedent authority is as predicable of ratification by a corporation as it is of a ratification by any other principal, and is equally to be presumed from the absence of dissent.”



Citing *Mor. Priv. Corp.*, §618, and cases.

*Bank v. Duncan*, 35 So. (Miss.) 569. There creditors attack an assignment for the benefit of creditors on the ground that legal notice was not given of the stockholders' and directors' meetings authorizing the assignment. The court held that there being no claim of fraud on the creditors, the stockholders alone were concerned with these irregularities, and inasmuch as the stockholders approved, the creditors could have no relief. Numerous authorities are cited, including special reference to Judge Cooley's opinion in *Beecher v. Marquette*, 7 N. W. (Mich.) 695.

In the case of *El Cajon v. Wentz Co.*, 165 Fed. 619—C. C. A. 6th Cir.—a corporation in embarrassed circumstances conveyed most of its real property to one of its officers in discharge of an individual debt to him, and a general creditor sought to set aside the conveyance on the ground that the meeting at which it was authorized was irregular. Despite the appealing equities of the case, the court said:

“That action of the board has not been attacked by the corporation or its stockholders but has been acquiesced in and the conveyance upheld by the answer of the corporation herein. Under such circumstances it is not open to a creditor to question the conveyance if in fact it was made in good faith.” (p. 621.)

In *Swentzel v. Franklin Investment Co.*, 67 S. W. (Mo.) 596, the court held (598) that in the absence of fraud

“it is a matter of no concern to a creditor of a corporation whether a deed to the corporation’s property be ordered made by the individual directors, or whether it has been done by an order of the directors as a body at a board meeting, upon resolution duly spread upon the records of the corporation.”

The case of *Jordan v. Collins*, 18 So. (Ala.) 137, is much in point. There the contest was between a prior purchaser and a subsequent attaching creditor. It was claimed that the president was without corporate authority to make the sale. The stockholders approved the sale. The court held this was sufficient.

The reasons of the law are extremely well expressed in *Gordon v. Preston*, 1 Watts (Pa.) 385; 26 A. D. 75. There a mortgage had been ordered at a meeting of the directors of which a number of the absentees had been given no notice whatever. The court recognized that the effect of the matter was to enable a third of the directors to act perhaps in fact in opposition to the will of the rest. Nevertheless, the court held that since the validity of the mortgage was unquestioned by the corporation, although known to it all along, no one else has a right to object. “None but the parties to the act of delegation were competent to allege the existence of a defect in the authority.”

Another case in point clearly setting forth the reason of the law is *Ashley Wire Co. v. Illinois Steel Co.*, 45 N. E. (Ill.) 410. That was a mortgage

foreclosure in which the corporation, receivers and various creditors were defendants. The objection was that the mortgage was not authorized at a legal meeting of the directors. The court said (p. 412):

“The act sought to be impeached was within the general powers of the board of directors, and it has never been disavowed by the corporation \* \* \* Those affected by the act unquestionably may, and apparently do prefer to ratify it as just and proper, even if irregularly done, and of course if that is the case the other defendants have no right to interfere.”

To the same effect are

*Company v. Wood*, 119 Fed. 966, top p. 968, and end of opinion (affirmed 125 Fed. 337);

*Stiwell v. Company*, 94 S. W. (Ark.) 915;

*Company v. Miller, et al*, 151 N. W. 813;

*Railway Co. v. Shailer*, 141 Fed. 585 (C. C. A. 5th Cir.);

*Hubbard v. Camperdown Mills*, 2 S. E. (S. C.) 576;

*Johnson Co. v. Miller*, 34 Atl. (Pa.) 316;

3 *Clark & Marshall Priv. Corp.* 2076, 2090, 2348.

Reverting to the opinion of the lower court in the case at bar, the court's own reliance of *Company v. Haskell*, 144 Mo. 331, recognizes our law as to ratification by acquiescence, in saying:

“When such an assignment has not been validated by acquiescence or laches, it may obviously be impeached \* \* \* ” (Rec. p. 233.)

As to the other point that it does not lie in the mouth of a creditor to question the regularity of the assignment in the absence of fraud, the court had no answer whatever. No authority to meet this was adduced.

We submit that alike under reason and authority on both grounds which we have discussed, the assignment of the Alaska assets stands as the act of the assignor corporation.

## II.

### *The transfer was voluntary.*

The district court's decision that the transfer was involuntary was based solely upon two cases involving identically the same set of facts, by the federal circuit court and the state court in Kentucky. The cases are *Zacher v. Fidelity & Safety Vault Co.*, 59 S. W. 493, and *Huntington v. Railway Co.*, 98 Fed. 459 (see rec. pp. 236-9). The facts as set forth in the state court opinion show that previously to the appointment of a receiver for the company in Connecticut, it had turned over nearly a million and a half dollars to one favored creditor who was a stockholder of the company, which left its treasury empty, and that it had turned over practically all of its other property to officers of the company to protect them against loss upon certain obligations which they had signed as security for the company; so that in fact when the transfer was made to the receiver in Connecticut there was practi-



cally nothing for him to receive and distribute amongst the other creditors, including those in the state of Kentucky. It was contended that the whole proceeding in Connecticut was a scheme to prefer certain creditors to the prejudice of all others, and the court upon reviewing the testimony held that it disclosed "the most extraordinary disregard of the rights of the creditors of this corporation living in the state of Kentucky." It held there was in fact no voluntary or common law assignment for the benefit of all the creditors equally, made or authorized by the corporation, and especially remarked that the judgment in the receivership matter "did not purport to be a consent judgment." (See pages 494, col. 1 and 495, col. 2).

The facts in the instant case certainly are not to be compared with those in the Kentucky case. Here there has been no transfer to favored creditors of all the company's assets. On the contrary the company and all interested parties have sought to secure an equal distribution of all its assets among all its creditors, regardless of citizenship and residence. The defendant in error who by his attachment seeks to be preferred above all the other creditors is the only exception. In the case at bar the order entered just previously to the transfer of the Alaska assets *does expressly on its face purport to be entered upon the consent of the company.*

No special consideration need be given to the case in the federal court which arose under the

same set of facts, there simply being another fund involved. There it was decided too that no independent assignment for the benefit of creditors was ever intended, but merely one worked out through the operation of a judgment of the court under the statutes of the state of Connecticut (pp. 462, 464). The court decided that since all the proceedings in the receivership matter were in form involuntary it would not go behind the form of the proceedings themselves to determine to what extent the company acquiesced in them, but this view evidently did not commend itself to the circuit court of appeals, whose review of the decision is reported in 106 Fed. 593. The appellate court considered itself bound by the state court's holding on identically the same set of facts, that the transfer was involuntary, but one is convinced with very little reading between the lines that the circuit court of appeals did not agree with the state court's decision and would have held the transfer voluntary had the question been open to it. It considered, however, that to disregard the state court's holding in a concern of "purely local policy of the state \* \* \* would be a scandal upon the administration of justice."

The facts of the instant case contrast remarkably with those in the Kentucky case with respect to the features which seem decisive there. Here there is no scheme to prefer any creditor. Here all the assets have been put at the disposal of Mr. Schoenwald and Mr. Hills as trustees for the benefit of all

the creditors of the company equally. Here the receivership suit was a friendly proceeding planned and participated in by the company at its origin for the purpose of securing equality to all the creditors, and here the order relating to the transfer of the Alaska assets on its face is a consent order, and this fact alone eliminates the Kentucky case as an authority in point.

The facts in our case which we advert to now will show that there are two independent grounds upon which the transfer of the Alaska assets should be held to be a voluntary assignment.

*First.* The receivership itself was a voluntary proceeding, and hence even if the transfer had been a necessary incident of the receivership (which it was not), nevertheless as a part of a voluntary proceeding the transfer too would have been voluntary.

*Second.* As a matter of fact, the transfer of the Alaska assets was no part of the receivership proceeding in Washington, but an independent voluntary transaction.

We shall consider these two grounds in the order mentioned, in relation to the evidence. The testimony shows beyond question that the receivership was a voluntary proceeding. True it in form is adversary since it is begun by complaint and petition of a creditor (rec. p. 177). However the whole matter was pre-arranged with the company, which freely adopted this means of distributing its assets

to its creditors. The following is quoted from the testimony:

“In order to secure equality among the creditors of the company and to preserve the assets it was deemed wise by the company’s officers and directors and by the principal creditors and stockholders to have receivers appointed.” (Dep. Kells, rec. p. 66.)

The president of the company testified that “we wanted to protect the creditors and get the company in shape again, and so a friendly suit was started and receivers appointed.” (Dep. C. O. Steberg, rec. p. 83.)

As further evidence that the suit was a pre-arranged friendly proceeding, note that the complaint, answer, order appointing the receiver, and receiver’s bond and oath were all filed the same day (rec. pp. 177-185 inc.), and although the answer ends with a formal demand for the dismissal of the complaint, yet it does not deny a single substantial allegation of that pleading (rec. p. 180).

The company’s funds and salmon pack were tied up by garnishments; it could not meet its current obligations, and other suits were threatening. Naturally, as it desired its creditors treated with equality, it adopted the plan of a receivership (rec. pp. 92, 151). By voluntarily adopting the receivership proceedings it exercised its right of ownership to dispose of its property as it wished as much as though it had made direct transfer to its creditors.



In principle our case is like that of *Ward vs. Manufacturing Co.*, 41 Atl. 1057, 1059, col. 2. There a majority of the company's stockholders brought a suit for its dissolution and had a receiver appointed. In the case at bar, although a creditor brings the suit and asks for a receivership the evidence shows that this was the course adopted by the company to obtain equality among its creditors, and was concurred in by the directors and stockholders and authorized and initiated by them just as much as the proceeding in the *Ward* case was. The method of procedure was formally different in the two cases, but in fact both were the voluntary acts of the company. In that case the court said that the proceeding was a voluntary one because its purpose was to carry out the vote of the directors through the agency of a receiver. Practically the same thing is true here. The receivership was adopted by the company as an agency for distributing its assets to its creditors. The court notes in that case, as evidence of its voluntary nature, that there was a stipulation for the immediate return of the writ and for a hearing on the day of its issue. So in this case, the answer of the company was filed the same day as the complaint and the receiver was immediately appointed, both parties attending for the purpose. The court says in that case that a decree which three-fourths of its shareholders had sought and none opposed cannot fairly be recognized as other than a voluntary one. In this case the evidence shows that the directors and all of the stock-

holders approved the appointment of the receiver and that none opposed it. The court held in that case that the receivership proceeding was an exercise by the company of the *jus disponendi* which is incident to ownership of property, and that the title vested was good everywhere. Disregarding the purely formal aspects of our matter and looking at the substance, it cannot be distinguished from the Ward case.

Turning now to the second ground above stated for holding the transfer to be voluntary, assume that the receivership proceeding was involuntary. It involved only the property of the company in Washington. It is not claimed that the company was obliged upon receivers being appointed to transfer the Alaska assets to them. The evidence shows there was no such statute or necessity. In fact the receivership had operated a considerable time before an assignment was made, and the positive, undisputed testimony is that the transfer was not made under or with reference to any Washington law or statute. (Dep. Kells, rec. p. 73 and dep. Smith, rec. p. 99.) It is true of course that after the transfer was made the same persons who were receivers in Washington and had control of the assets there, also by virtue of the transfer had control of the Alaska assets, but it was only subsequent to the voluntary assignment by the company of the Alaska assets and as a matter of convenience and economy, that the receivership had any control over those assets or over the company with respect to them.

The directors and stockholders of the company and the receivers independently of the court concluded that the transfer of the Alaska assets to the receivers should be made in order to secure an equal distribution of the assets among the creditors, and when the matter was fully planned and the company had agreed and was ready to make the transfer, although it was not at all necessary it was thought best to submit the plan to the Washington court and have its approval of the receivers undertaking the distribution of the assets in Alaska. The idea of a transfer originated with the company subsequent to the receivership suit as a means of preventing preferential and unfair action by Alaska creditors with reference to the Alaska assets. The company realized that the court in the receivership matter had jurisdiction only within the state of Washington over the assets there; that suits might be brought in Alaska, and the assets there attached, and thus great unfairness and inequality result; and it chose the receivers who already had legal control of the Washington assets as suitable trustees to whom to make a voluntary assignment of the Alaska assets, thus to secure a fair distribution of these too. Had it desired, the company might have assigned the Alaska assets to any other person for the same purpose. The evidence shows conclusively that the action on the company's part in making the transfer of October 26, 1914, was a free exercise of its right to dispose of its property as it saw fit. The following is quoted from the testimony:

"The instruments were executed in order to give the receivers legal title to the assets in Alaska and thus avoid the necessity of ancillary receivers being appointed there. The action was entirely voluntary on the company's part. \* \* \* The officers, principal stockholders and creditors concurred in wishing to have the control of all the company's affairs in the hands of the company's receivers at Seattle, where its principal office had always been, and where its business interests were centered." (Dep. Kells, rec. pp. 68-69.)

"The purpose of the transfer was to make the handling of the properties as simple, cheap, and effective as possible for the protection of all the creditors alike. Yes, everybody desired this and approved of transferring the Alaska assets to the receivers. All the directors approved of this, and so far as my knowledge went all the stockholders did. I personally know that a large majority of the stockholders did." (Dep. Steberg, rec. p. 84.)

"Every trustee, and I believe every stockholder, certainly the vast majority of the stockholders, approved the execution of these instruments transferring the legal title of the Alaska assets to the receivers." (Dep. Smith, rec. p. 96.)

Also see the deposition of E. Schoenwald, record pages 153-154:

The only semblance of compulsion about the matter is that the order of the court approving the transaction in form directs the transfer. The same order, however, recites that the company's president was present representing it and consented to the



order, and the testimony shows that the whole matter was prearranged and agreed upon by the company, and the court only entered the order when assured of this. This is the testimony:

“The court did not compel the transfer. It was fully planned, agreed upon and the instruments in process of preparation before any court order was obtained or the court acquainted with the plan. The purpose of the order was to have the approval of the court.” (Dep. Kells, rec. p. 70.)

“Naturally we wished the court’s approval of the receivers’ taking conveyance of the legal title of these assets, and also we desired the court to know that the company was favorable to the transfer of the assets. Therefore it was arranged that the receivers and my law assistant, acting for me, should go before the court the next day at Seattle, along with the president of the company, and the matter of a voluntary transfer be submitted to the court and approved by him. This was accordingly done. The court particularly assured himself that the company favored and desired to make such transfer, and thereupon he sanctioned the conveyance to the receivers.” (Dep. Smith, rec. p. 95.)

“There was no thought of compelling the company to execute the instruments of transfer. The court not only did not attempt to do this, but explicitly rested its order upon the acquiescence and consent of the company.” (Same, rec. p. 96.)

“The court asked particularly whether the company desired this, and Mr. Steberg told him it did. We also told him that the committee of the creditors, and everybody interested, so far as could be determined, was in favor of the

action as the natural, simple and economical thing to do. The court then approved the arrangement, and the deed and bill of sale which had already been drawn, were signed by the company through its president, and were delivered by Mr. Steberg to me." (Dep. E. Schoenwald, rec. p. 154.)

"The court simply approved the arrangement which had been made, after inquiring and being told, in my hearing, that the company as well as the creditor's committee and the receivers favored this." (Same, rec. p. 155.)

The fact that the court in the receivership matter might in the instant case after the assignment have more or less control over the Alaska assets through its receivers, is immaterial since it only obtained this authority by the voluntary act of the company in freely turning over the assets to the receivers. The case of *In re Farrel*, 176 Fed. (C. C. A. Sixth Cir.) 505, 510, 511, adequately covers this point. There it was contended that the statute of Ohio was an insolvent law because after an assignment was made for the benefit of creditors it regulated the trust, but the court quoted from *Mayer v. Hellman*, 91 U. S. 502, in answer to this, as follows:

"It does not compel or in terms even authorize assignments. It assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced \* \* \* The assignment in this case must, therefore, be regarded as though the statute of Ohio to which reference is made, had no existence. There is an

insolvent law in that state; but the assignment in question was not made in pursuance of any of its provisions."

The court continues, saying that the statutes of Ohio presuppose the existence of a deed of assignment and creation of a trust, and simply undertake to regulate the trust later for the equal protection of the creditors; but "the right so to dispose of the property in trust is not dependent upon the statute. It is an ordinary attribute of ownership." (p. 511.)

So in the case at bar, the receivership proceeding did not compel or even authorize the assignment of the Alaska assets, and the assignment in this case should be regarded as though a receivership and the statutory law of Washington did not exist. The court in the receivership matter here might undertake to regulate the trust after it was created, but again to quote the words of the case just cited, "the right so to dispose of the property in trust is not dependent upon the statute (or upon the receivership proceeding), it is an ordinary attribute of ownership."

### III.

*The transfer being voluntary was binding in Alaska.*

The district court assumed that we are asking for a decision in our favor upon the ground of comity (rec. p. 229 et seq.). Our claim, however, is based upon the ground that the assignment was

in accordance with the common law, which is the law of Alaska as well as of Washington, and the court in Alaska in enforcing the assignment is not recognizing the laws of Washington as a matter of comity, but is applying its own law applicable to such assignment. As said in *Stowe v. Belfast Savings Bank*, 92 Fed. (C. C. D. Me.) 90, 96: "It is not an exercise of comity to administer the local law though it agrees with the foreign law."

Our position is well stated by Judge Field (later Chief Justice), in *Train v. Kendall*, 137 Mass. 366, as follows:

"In the absence of any statute making this assignment void or voidable by Massachusetts creditors, the common law prevails in actions at law, for it is the common law which the plaintiff invokes, and not any process, if there be any, for the equitable distribution of the assets of Kendall Brothers, found in Massachusetts. In so deciding, we do not give effect to a foreign law prejudicial to our own citizens; we give effect to an assignment which is good against the plaintiff in this action by our own law."

In the case of *Weider v. Maddox*, 60 Tex. 372, 377, the court criticizes expressions by various courts to the effect that voluntary assignments are recognized in other jurisdictions as a matter of comity, and in this connection says:

"This seems to us to confer upon the courts a power too little restricted, too undefined and unlimited, to be tolerated in any country governed by laws. What, upon such a matter, is to



be deemed injurious to the rights of the citizens of the state in which the property is situated, should be the subject of legislative, and not Judicial discretion. Storey on Conf. of Laws, 390; *Guillander v. Howell*, 35 N. Y. 659.

“That the assignment was made in the state of Missouri is a matter of no importance, as its validity does not depend upon any local law of that state, but is based on the common law right of an insolvent debtor to make an assignment of all his property, subject to the payment of his debts, for the benefit of his creditors.”

Since voluntary assignments are made under the common law, the rule almost universally accepted is that such assignments of personal property in one jurisdiction are good in every other as against attaching creditors, whether residents or non-residents, unless the transfers are contrary to the positive law or established public policy of the state where they are sought to be enforced. We shall later note two or three jurisdictions which have an exceptional rule.

In the case of *Stowe v. Belfast Savings Bank*, supra, one Dove, a resident of Massachusetts, assigned all of his property to one Ropes of the same state for the benefit of his creditors. The plaintiff is the successor of the assignee Ropes. The defendant bank, domiciled in Maine, afterwards attached there the real estate in question as the property of the original owner Ropes. The only question was whether an assignment in Massachusetts took precedence over the subsequent attachment

in Maine by a Maine creditor. The district court quoted Chief Justice Fuller in *Cole v. Cunningham*, 133 U. S. 107, 129, as follows:

“In most states the distinction between involuntary transfers of property, such as work by operation of law, as foreign bankrupt and insolvency laws, and a voluntary conveyance is recognized. The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation outside the state in which the law was passed.” (p. 95.)

The court refused to follow the holding of the supreme court of Maine in the case of *Fox vs. Adams*, 5 Maine 245, and decided that the assignment in Massachusetts took precedence over the subsequent attachment in Maine by a resident creditor there. The case was appealed and affirmed by the C. C. C. A. 1st Circuit, 92 Fed. 100, the appellate court holding that a discrimination in favor of local creditors just because of their citizenship was in violation of section 2 of Article IV of the constitution, providing that “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states,” and considered that the supreme court of the United States had so decided in *Blake v. McClung*, 172 U. S. 239,; 43 L. Ed. 432.

In that case a statute of the state of Tennessee gave creditors resident in the state a priority over non-residents in the distribution of the assets of a

foreign corporation. This statute was held unconstitutional as in violation of sec. 2, Article IV, giving equal privileges and immunities to the citizens of the several states. See also *Blake v. McClung*, 176 U. S. 59; 44 Law Ed. 370, 374.

The same statute was under consideration, and the same conclusion reached in *Sully v. American National Bank*, 178 U. S. 289; 44 Law Ed. 1072, 1075-6; and a similar statute of the state of Michigan was considered and held unconstitutional in the case of *Maynard v. Granite State Provident Association*, 92 Fed. (C. C. A. Sixth Circuit) 435, 438. The provision of these statutes is exactly the same as the principle which the district court in this case considered to be the law, namely, that although the transfer were voluntary, yet Alaska creditors would be excepted from its operation although citizens of other states were not. The same discrimination in favor of citizens of a particular state provided for in these statutes, and which was condemned as unconstitutional by the supreme court, was considered by the lower court in this case to be legal. As authority for its conclusion it cited *Security Trust Co. v. Dodd, Mead & Co.*, 173 U. S. 624, 628, where the court stated that "such assignments (voluntary) will be respected, except so far as they come in conflict with the *rights of local creditors*, or with the laws or public policy of the state in which the assignment is sought to be enforced." Commenting on this, the court in the case at bar in his opinion says:

“According to this the rights of local creditors are safe-guarded whether the assignment be a common law assignment or a statutory assignment.” (Rec. p. 234.)

The decision here assumes that the supreme court decided in the Dodd case that a voluntary assignment would be respected as binding upon all creditors except those in the jurisdiction where it was sought to be enforced, and that the courts there would discriminate in favor of local creditors. We submit that the supreme court decided no such thing. If it did, it certainly later repudiated the decision when in the case of *Blake v. McClung*, supra, it decided that such discrimination was unconstitutional. Not one of the cases cited by the supreme court in the Dodd case in support of the principle announced admits of discrimination in favor of local creditors.

Among these cases cited is *Black v. Zacharie & Co.*, 3 How. 382; 11 L. Ed. 690. There Black in South Carolina assigned all his property for the benefit of creditors. Subsequently Zacharie & Co., residents of Louisiana, attached there certain stocks formerly owned by Black. In a contest between the assignee and the attaching creditors the supreme court, Justice Story writing the opinion, held that an assignment valid in South Carolina was binding everywhere, and although Louisiana is sometimes cited as a jurisdiction which makes a preference in favor of local creditors as against foreign assignees, the supreme court considered it as having



adopted the generally accepted rule. See 11 Law Ed. 704, col. 2.

Manifestly in the Dodd case the court meant by the expression "rights of local creditors," rights which they possess under the statutory or customary law of the state of their citizenship, and not rights secured merely by a discrimination in favor of local creditors just because they are citizens, and against all others just because they are not citizens.

The only jurisdictions apparently which seek to discriminate in favor of resident creditors, holding that a foreign voluntary assignment does not take preference over their subsequent attachments, are Maine and Illinois. See note 65 L. R. A. 355, col. 2 et seq. Massachusetts is also sometimes classed with these two states, but its decisions in *Means v. Hapgood*, 19 Pick. 105, and *Train v. Kendall*, 137 Mass. 366, are in accordance with the generally recognized rule.

The cases holding that a voluntary assignment in one state is good everywhere regardless of the citizenship of the attaching creditors are too numerous for citation. The following are some of these:

*Carter Battle Grocery Co. v. Jackson*, 45 S. W. (Tex.) 615;

*Askeu v. The LaCygne Exchange Bank*, 83 Mo. 366, 369-371;

*Van Wyck v. Read et al*, 43 Fed. (C. C. N. D. Fla.) 716, 718;

*Atherton v. Ives*, 20 Fed. (C. C. Ky.) 894;

*Law v. Mills*, 18 Pa. St. 185;

*Frazier v. Fredericks*, 24 N. J. L. 162, 166,  
167;

*Johnson v. Sharp*, 31 Ohio St. 617, 619;

*Coffin v. Kelling*, 83 Ky. 649, 656;

*Union Savings Bank & Trust Co. v. Indianapolis Lounge Co.*, 47 N. E. (Ind.) 846,  
847 col. 2, and cases there cited.

In the case of *Frazier v. Fredericks*, among those just cited, the court said, page 167:

“A voluntary assignment, made by a debtor for the benefit of his creditor, would seem, upon principle, to stand upon the same ground, so far as the present inquiry is concerned, with any other transfer of personal property by the owner. If, then, a sale by the owner of property lying in a foreign state be effectual for the absolute transfer of the property to the vendee, an assignment of the same property for the benefit of creditors must be equally valid and effectual.”

The court also approves the language of Chancellor Kent to the effect that the acts of parties, valid where made, should be recognized in other countries, provided they be not contrary to good morals nor repugnant to the policy and positive institutions of the state. (p. 166.)

Other cases holding foreign voluntary assignments good even as against resident creditors are:

*Walters & Walker v. Whitlock*, 9 Fla. 86;  
76 Am. Dec. 607, 8-13;

*Clark v. Connecticut Peat Co.*, 35 Conn. 303,  
307-8;

*Ockerman v. Cross, et al.*, 54 N. Y. 29, 32.

The general rule is also stated and approved in the cases of *Barth v. Backus*, 35 N. E. (N. Y.) 425, 426, and *Weider v. Maddox*, 66 Tex. 372, 376, 379.

In *Catlin v. Wilcox Silver Plate Co.*, 24 N. E. (Ind.) 250, 253, the assignment in Illinois was involuntary. An attachment was made by Connecticut creditors in Indiana. It was contended that since the attaching creditors were nonresidents the assignment, though involuntary, should be recognized as to them, although it would not be as to resident creditors of Indiana. The court said:

“The rule which commends itself to our judgment is thus declared: ‘Once properly in court and accepted as a suitor, neither the law nor court administering the law will admit any distinction between the citizens of its own state and that of another. Before the law and its tribunals there can be no preference of one over the other.’ *Bank v. Lacombe*, 84 N. Y. 367. \* \* \* This rule governs the more recent decisions.”

In the case of *Segnitz v. Trust Co.*, 83 N. W. (Wis.) 327, 328, col. 1, the assignment was also held involuntary since the statute under which it was made contained bankruptcy features. However, the rule governing assignments is well stated as follows:

“The general proposition may be stated that a voluntary common law assignment for the benefit of creditors good in the state where made carries title to personal property wherever situated. This court has so held and such holding is supported by the great weight of authority (numerous cases are cited). In Illinois, Louisiana and Maine and possibly some other states the rule is limited and will not be allowed to prevail as against creditors of the assignor residing in those states. (Cases from Illinois and Maine cited.) The general rule, however, is as above stated.”

See also the following cases in which the rule is recognized, discussed and clearly stated:

*Moore v. Land Title & Trust Co.* 33 Atl. (Md.) 641;

*Roberts v. Norcross*, 45 Atl. (N. H.) 560, 561 col. 2;

*Byers v. Tabb et al*, 25 So. (Miss.) 492, 493 col. 2;

Since the assignment of the Alaska assets was a free exercise by the company of its right to dispose of its property, it should have been recognized in Alaska even though McDonald, the attaching creditor, was a citizen there. No one has at any time claimed that the assignment was contrary to any statutory or customary law of Alaska.

To sum up, the transfer of the Alaska assets was the act of the corporation by validation through acquiescence of all the stockholders, if not otherwise.



And moreover, the question of the regularity of its execution in the absence of fraud cannot be raised by a creditor. The lower court in its opinion is silent as to both these grounds.

Second, as a matter of fact and under the law also, the assignment here was the voluntary act of the company and was merely an exercise of the owner's right of disposition of all the property for the benefit of all the creditors alike. The only case presented in the lower court to sustain the court's decision that this transfer was involuntary was one clearly distinguishable in its facts; one in which all of the assets except those attached in the state of Kentucky had been turned over to a few individuals on the inside, stockholders and directors, by way of rank preference, leaving substantially nothing to all the rest of the creditors. Whereas here the plaintiffs are seeking to execute justice for all the creditors alike, whereas the defendant McDonald is seeking to prefer his individual claim at the expense of all the remaining creditors, wholly without just reason. We submit that every uncertainty or doubt should be resolved in favor of the plaintiffs in error in this case for this reason, if no other.

Third, the transfer being voluntary as contrasted with involuntary or statutory, the authorities all concur, federal and state, with the single exception of two or three state jurisdictions, that the assignment is good everywhere, and that therefore

the property in question was not subject to the attachment of McDonald.

For these reasons it is earnestly maintained that the judgment of the lower court should be reversed and set aside, and judgment ordered for the plaintiffs in error.

Respectfully submitted,

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*Attorneys for Plaintiffs in Error.*



IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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E. SCHOENWALD and S. T.  
HILLS as Receivers and As-  
signees of the Pacific Coast &  
Norway Packing Company, a  
corporation,

*Plaintiffs in Error,*

VS.

HARRY A. BISHOP, as Unit-  
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Alaska, and D. N. McDON-  
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*Defendants in Error.*

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UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT FOR THE DIS-  
TRICT OF ALASKA, DIVISION NO. 1.

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**Answer Brief of Defendants in Error**

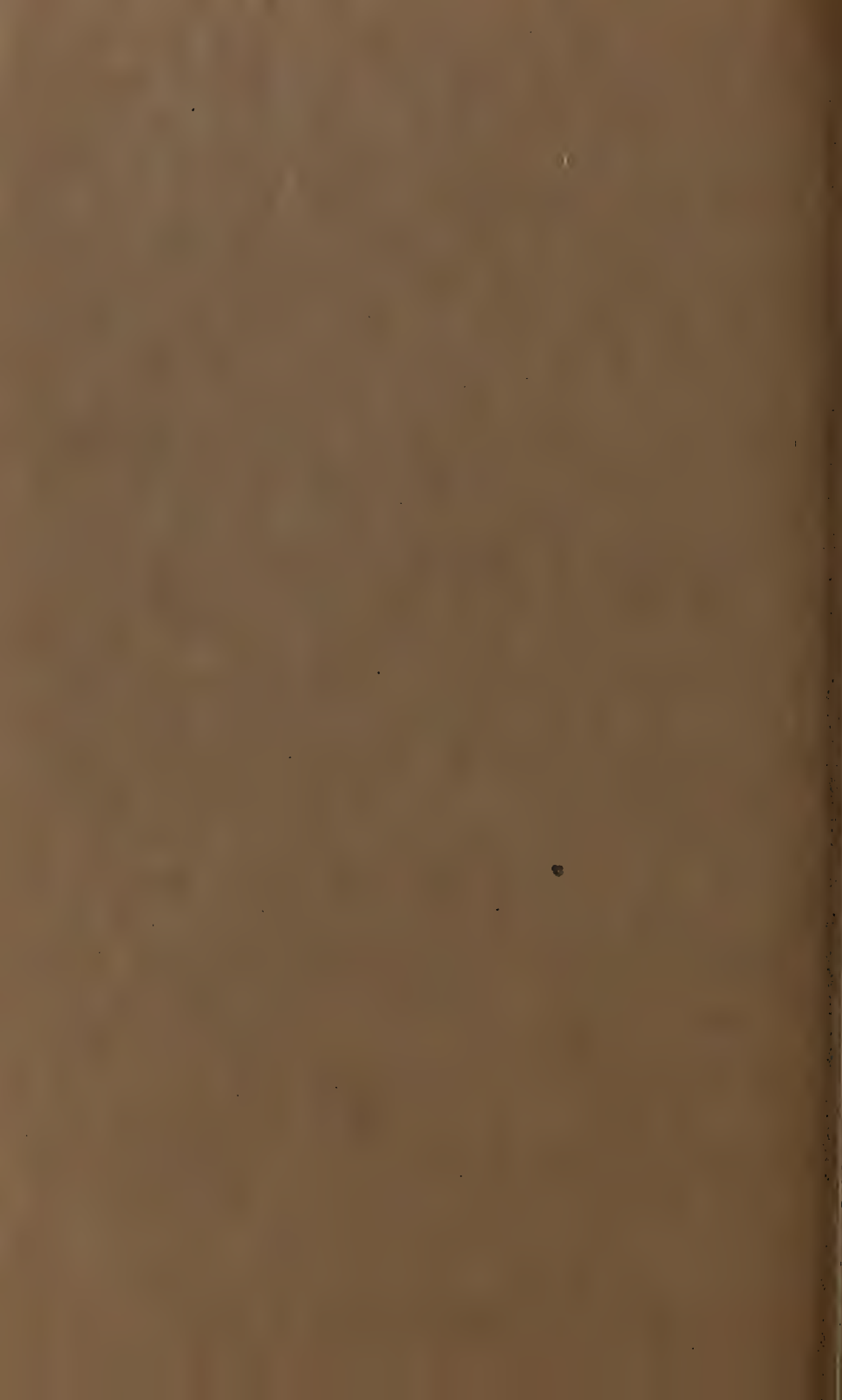
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GUNNISON & ROBERTSON,

*Attorneys for Defendants in Error.*

Filed





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STATEMENT OF THE CASE.

The plaintiffs, who are citizens of the state of Washington (P. R. pp. 79, 87, 104, 162), were appointed receivers by the superior court of King

county, state of Washington (P. R. pp. 74, 85, 100, 101, 181, 186), upon petition of one Roy V. Nevin, a creditor (P. R. pp. 78; 85, 86; 103, 104; 161, 162; 177), of the Pacific Coast & Norway Packing Company, a Minnesota corporation (P. R. pp. 1, 198), which appeared in answer to the petition, placed in issue certain allegations of the complaint, and prayed that the action be dismissed and that it recover its costs and disbursements. (P. R. pp. 179, 180.)

On October 26, 1914, the Washington court, upon application of the plaintiffs Schoenwald and Hills, as receivers (P. R. p. 200), it appearing to that court that such conveyance and transfer were necessary to the successful conduct of the receivership (P. R. p. 201), ordered that the corporation convey to said receivers all of its title to real estate situated in the territory of Alaska and transfer to said receivers all its personalty there situated, and directed the president of the corporation to execute and deliver to said receivers a sufficient deed to said real estate and a bill of sale of said personalty (P. R. p. 201).

Pursuant to said order (P. R. p. 198), on October 26, 1914, a transfer was made purporting to sell, transfer and set over unto the plaintiffs as receivers of the first party corporation and not otherwise (P. R. p. 198) certain personal property in Alaska, including the power boat "Bernice" (P. R.

p. 199), which vessel, with her furniture, etc., is the property in controversy.

The "Bernice" at all the times in controversy was an American licensed vessel of 11 net tons, documented and licensed in the United States Customs District of Alaska (Answer, P. R. p. 12; not denied, Reply, P. R. p. 23), and was at all times within the jurisdiction of the Alaska court (P. R. 74, 100, 158) and at no time in the state of Washington. (P. R. pp. 74, 85, 100, 158.)

The instrument of transfer was never recorded in the office of the collector of customs for the district of Alaska (P. R. pp. 75, 100, 159); in fact, was never placed of record in any office whatsoever (Finding No. 7, P. R. p. 217).

Defendant McDonald, who is a local creditor of the corporation in Alaska (P. R. p. 88), holding a just claim against the corporation (Ev. Burton, pp. 126, 133, 134; Answer, P. R. p. 10; not denied in Reply, P. R. p. 22), duly commenced an attachment action on January 25, 1915, in the same court that this trial was had in, and caused the vessel, her furniture, etc., to be duly attached by the defendant Bishop as United States marshal at Petersburg, Alaska, and on April 20, 1915, a trial having been had in said attachment suit, McDonald recovered judgment against the corporation, which judgment ordered and adjudged that said vessel be sold to satisfy the demands of said McDonald against said



corporation (Answer, P. R. pp. 10, 11, 12, 13; not denied, Reply, P. R. p. 22). McDonald had no notice of the transfer (Ev. Burton, P. R. pp. 136, 142, 143, 144, 147) and never assented to, or received any benefit under, either the receivership or the conveyance (Finding No. 13, P. R. p. 219).

The case was tried by the court before a jury, but the jury was discharged upon agreement at close of plaintiffs' case (P. R. p. 25), and the court entered judgment for the defendants (P. R. p. 27), from which the plaintiffs prosecute this writ of error.

The question is: Are the plaintiffs entitled to the personal property as against the defendants?

We most respectfully submit that the question must be answered in the negative for the reasons hereinafter mentioned.

## POINTS.

1. Statutory and involuntary assignments for benefit of creditors will be given only such effect in other states as the laws of such state permit, and must give way to claims of creditors pursuing their remedies there.

2. Voluntary or common-law assignments for benefit of creditors will not be respected in other states when they come in conflict with the rights of local creditors, or with the laws or public policy of

the state in which the assignment is sought to be enforced.

3. An unrecorded assignment (for benefit of creditors) of an American vessel is invalid as against a creditor of the assignor who seeks to sequester the property to the satisfaction of his debt.

## ARGUMENT.

### I.

STATUTORY AND INVOLUNTARY ASSIGNMENTS FOR BENEFIT OF CREDITORS WILL BE GIVEN ONLY SUCH EFFECT IN OTHER STATES AS THE LAWS OF SUCH STATE PERMIT, AND MUST GIVE WAY TO CLAIMS OF CREDITORS PURSUING THEIR REMEDIES THERE.

(A) *The conveyance in controversy was not the act of the corporation.*

Plaintiffs admit that there had been no meeting of any kind of the board of trustees or directors or of the stockholders (Dep. Kells, P. R. p. 76; Dep. Steberg, P. R. p. 86; Dep. Smith, P. R. p. 101; Dep. Schoenwald, P. R. p. 160) held for the purpose of authorizing, acquiescing in or ratifying either the receivership proceedings or the conveyance to the plaintiffs, nor any meeting of either directors or stockholders since the annual meeting before the

receivership (Dep. Steberg, P. R. p. 86; Dep. Smith, P. R. p. 101; Dep. Schoenwald, P. R. p. 160).

However, plaintiffs say "the assignment of the Alaska assets stands as the act of the assignor corporation" (Brief, p. 17) and cite authorities which they contend support that view. The distinguishing features of those cases are so different from the features of the case at bar that we do not feel it necessary, in view of controlling cases cited by us *infra*, to point out the distinctions in each particular case, except to say that in some of them the corporation or its minority stockholder was clearly estopped, and in all of them which we have had opportunity to examine the burden was on the person making the attack, and there was no necessity for the person resisting the attack to make out in the first instance a valid or duly authorized title. Moreover, Professor Thompson, whose work on Corporations, Section 6165, was quoted by the court in *Marsters v. Oil Co.*, 90 Pac. (Ore.) 151, as supporting their decision, in later sections of his work (5 Thomp. Corp., Sec. 6478, 6479) lays down the rule with reference to assignments for benefit of creditors which was followed by the trial court in this case.

In the case at bar plaintiffs' entire contention is based upon the fact that they have a good and sufficient title, because the corporation voluntarily and of its own free will and accord, for the benefit of all its creditors, made a good and sufficient deed of con-

veyance to them. (Complaint, P. R. p. 3.) It was upon that title that they relied to make out a case, and to establish such title it became necessary that they prove in the first instance that the assignment was the duly authorized act of the corporation.

2 R. C. L., p. 649;

5 Thomp. Corp., Secs. 6478, 6479, *supra*.

And as stated in *Friedman v. Lesher*, 198 Ill. 21, 64 N. E. 736, 92 A. S. R. 255, at 259, wherein the facts showed: That the president died on June 5, 1896; that the vice-president, who owned 50 out of the total 60 shares of stock, on June 6, 1896, made an assignment for benefit of creditors, which was ratified by the remaining directors on the same day but not before suit had been instituted and judgment entered for Lesher:

“ ‘Unless otherwise provided by statute, the general rule is that a corporate assignment must be executed by the board of directors, or a quorum thereof, at a meeting duly called for that purpose, or by the president or some other officer of the corporation, as authorized by the directors.’ 3 Am. & Eng. Enc. of Law, 2d ed., 24, and cases cited in note 2; 4 Thompson on Corporations, Sec. 4636; *State Nat. Bank v. Union Nat. Bank*, 168 Ill. 519, 48 N. E. 82.”

And as stated in *Calumet Paper Co. v. Haskell*, 144 Mo. 331, 66 A. S. R. 425, which was cited by the trial court and wherein the facts were: The corporation had five directors, all of whom were stockholders; on July 8, 1893, the corporation being



insolvent, two of its directors made an assignment for benefit of creditors to Parker as assignee, the other three directors neither being present nor having notice; although there was some evidence to show ratification of assignment by stockholders; plaintiff commenced suit on August 9, 1893, by attachment, and served assignee with garnishee process:

“Where a creditor elects to disregard the assignment and attaches the property of the corporation, and thereupon a contest arises between him and the assignee, the question is one which concerns the title of the assignee to the property, and it is properly drawn in question in such a proceeding; it is not a question where, in theory of law, the validity of the assignment is subject to collateral attack. But if it were, the rule would be the same; since such an assignment is not a judicial proceeding, and in every case where any person asserts rights under it as against a stranger, the burden is upon him to show at least an assignment valid on its face; and the other party may show that it was invalid by reason of extrinsic facts, as that it was unauthorized by a legal meeting of the directors: 5 Thompson on Corporations, sec. 6478. When such an assignment has not been validated by acquiescence or laches, it may obviously be impeached, either by creditors or stockholders, on the ground that it was not made by the directors at a meeting duly convened, that is to say, on the ground that it was not made by the board of directors at all, for the acts of the directors are of no validity unless they are regularly assembled and acting as a board, and unless the proper quorum has concurred in the action which is challenged: 5 Thompson on Corporations, sec.

6479. The members of the board, severally, could not ratify the assignment, because they could not, in the first place, have made it in their individual capacity, but only as a board, and not otherwise could they ratify it so as to effect this plaintiff."

Plaintiffs offered no evidence whatsoever, either documentary or oral, that the corporation had authorized, acquiesced in or ratified their alleged title, except that the directors at odd times and on haphazard occasions had approved it, and that a large majority of the stockholders had been communicated with, or their representatives informed of it. There is not a scintilla of evidence that the corporation, its directors or its stockholders, acting as such, authorized, acquiesced in or ratified any of these proceedings. The plaintiffs are in the identical situation that the defendants presenting an affirmative defense found themselves in in the case of *Doernbecher v. Col. City Lbr. Co.*, 21 Ore. 573, 28 Pac. 888. The facts in that case were as follows: Suit by judgment creditor of insolvent defendant corporation to enforce individual liability of three defendants, stockholders, for their stock subscribed and unpaid. Answer averred a general assignment by the corporation, prior to the commencement of suit, of all its property for benefit of creditors, and sole right of assignee to collect all monies due for stock subscribed and unpaid. Corporation had five directors, three of whom, without notice to other two, assembled by mutual consent and pretended to pass a reso-

lution authorizing an assignment, which was thereafter made in due form.

Judge Bean, speaking for the court in the case (*Doernbecher v. Col. City Lbr. Co.*), at page 899, 28 Pacific, said:

“It was urged at the argument that plaintiff could not, in this suit, question the validity of this assignment, because this is in the nature of a collateral attack. It is clear that the creditors as well as the stockholders can impeach the transfer of property by the corporation for want of previous action of the board of directors; but it is sometimes said this cannot be done collaterally, but only by a direct proceeding brought for that purpose. *Eno v. Crooke*, 10 N. Y. 60; *Castle v. Lewis*, 78 N. Y. 131. But on this record it can hardly be said that this is a collateral attack, within the meaning of this rule. Defendants rely solely upon this assignment as a defense to this suit. The plaintiff, therefore, has a right to insist that the proof in their behalf shall show an assignment on its face apparently valid; and this it fails to do, because it affirmatively appears it was not authorized at a legal meeting of the directors. Hence, there is simply a failure of proof, and the defense is not made out.”

(B) *A transfer made in a receivership proceedings by a corporation to its receivers pursuant to an order of the court is not a voluntary assignment for the benefit of creditors.*

The records of the receivership court show that the plaintiffs were appointed receivers upon the petition of one Nevin (*Dep. Kells*, P. R. p. 78; *Ex.*

A, P. R. p. 177), who was a creditor of the corporation (Dep. Kells, P. R. p. 78; Dep. Steberg, P. R. pp. 85, 86; Dep. Smith, P. R. pp. 103, 104; Dep. Schoenwald, P. R. pp. 161, 162; Ex. A, P. R. p. 177). The corporation did not confess judgment; it did not permit a default to be taken against it; but it appeared and resisted the petition, placing in issue under the sworn verification of its president and treasurer Steberg some of the allegations of the complaint and prayed that the complaint be dismissed and that it recover its costs (Ex. B, P. R. pp. 179 and 180).

The denials in its answer were sufficient to place in issue the allegations of the complaint to which they were directed, for the supreme court of Washington has said:

“An allegation in an answer that defendant ‘has no knowledge or information sufficient to form a belief’ is a sufficient denial to put in issue the allegation of the paragraph of the complaint to which it is addressed.”

*Colby v. Spokane*, 12 Wash. 693, 42 Pac. 112.

The court to which the petition was addressed, after reciting “upon the verified complaint herein and after argument of counsel for the plaintiff and the defendant Pacific Coast & Norway Packing Company,” ordered that Schoenwald be “appointed receiver of *all* the property, assets and business of the” corporation, and that he be “empowered to take possession of and to do all things necessary to



the preservation of the property and assets of the defendant, and continue the business of said defendant (corporation) with full authority to do all things necessary thereto, until the further order of the court, and shall from time to time report to the court his doings hereunder.” (Ex. C, P. R. pp. 181, 182.)

It is impossible to view these proceedings as anything other than adversary and involuntary. However, plaintiffs attempt to impeach this their own documentary evidence by oral testimony to the effect that the records of the receivership court are incorrect when they show that plaintiffs were appointed in an adverse suit. We submit that such testimony was incompetent and should not have been admitted, and that it can not have any weight whatever, and that the records themselves are conclusive on the plaintiffs and import absolute verity.

“A judicial record is conclusive, and can not be controlled by parol evidence.”

*Haskell v. Cunningham*, 221 Mass. 49, 108 N. E. 915.

“A judicial record imports absolute verity, and cannot be impeached by parol testimony.”

*In re Bishop*, 149 Ill. App. 491.

See also:

*Chappell v. Chappell*, 89 Pac. (Wash.) 166;

*Nichols v. Doak*, 93 Pac. (Wash.) 919.

The record speaks for itself, showing indisputably that the proceedings were adverse and instituted by a creditor and forced upon the corporation against its wish. A case clearly in point is *Blue Mountain, etc., Co. v. Portner*, 131 Fed. 57, wherein parol evidence of the judge who made the order appointing the receivers was offered to show the grounds of the order. District Judge Purnell, speaking for the Fourth Circuit Court of Appeals, at page 60 of 131 Federal, said:

“It does not require argument to sustain the position that the order appointing the receivers, being in writing, must speak for itself, and no declaration of the judge who signed it can be given as grounds on which he entered the order. Public records can neither be explained nor varied by parol testimony. They are conclusive, speak for themselves, and imply absolute verity. *Shankland v. Washington*, 5 Pet. 390, 8 L. ed. 166.

“It is a fundamental rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument unless in cases where contracts are vitiated by fraud or mutual mistake, but this rule is too well understood and recognized to admit of doubt. *Northern Assurance Co. v. Grand View Bld'g Ass'n*, 183 U. S. 308, 46 L. ed. 213.”

The United States Supreme Court denied a writ of *certiorari* in this case at 195 U. S. 636, 49 L. ed. 355.

In *Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co.*, 206 Fed. 813, the court said:

“Where a corporation’s officers applied for a receiver on an allegation in a petition that the corporation was insolvent, and the order appointing a receiver was based on the petition, parol evidence that the receiver was appointed, not on the ground that the corporation was insolvent, but to conserve its assets, was objectionable as contradicting the record.”

The records of the receivership court are equally as indisputable that the conveyance was adversary and involuntary. The court, after reciting that the matter came on to be heard upon the application of the receivers (not the corporation) for such an order, ordered that the corporation “convey to said receivers all its title to real estate situated in the territory of Alaska and transfer to said receivers all its personalty there situated,” and directed the corporation’s president “to execute and deliver to said receivers a sufficient deed to said real estate and a bill of sale of said personalty.” (Ex. L, P. R. pp. 200, 201.)

The conveyance was made in strict compliance with this order, and it recites “*that pursuant to the order of the Superior Court \* \* \* this day made and entered in the*” receivership case, “Pacific Coast and Norway Packing Company, a corporation organized under the laws of the state of Minnesota, first party, does hereby sell, transfer and set over unto E. Schoenwald and S. T. Hills, *as receivers of the first party corporation and not otherwise,*” certain described personal property in Alaska including the power boat Bernice. (Ex. K, P. R. p. 198.)

Plaintiffs sought to impeach this (their) documentary evidence by oral testimony to the effect that the conveyance was not made by direction of the court, but was the voluntary act of the corporation. We submit that the record speaks for itself, showing absolutely that the conveyance was made by the corporation because the court ordered it after an application had been made for the order by the court's officers, the receivers; further, that the instrument itself shows that it was made to the officers of the court in their official capacity and *not otherwise*. The plaintiffs could not contradict the judicial records and instruments.

See:

*Haskell v. Cunningham, supra;*

*In re Bishop, supra;*

*Chappell v. Chappell, supra;*

*Nichols v. Doak, supra;*

*Blue Mountain, etc., Co. v. Portner, supra;*

*Doyle-Kidd, etc., Co. v. Sadler-Lusk Co.,  
supra.*

It cannot be maintained that, if plaintiffs obtain the property in controversy, they will not be compelled to account for it or its proceeds to the court of whom they are officers. Their duty to do so is plainly prescribed by the order appointing them (P. R. p. 182); their bond is conditioned that they



do so (P. R. p. 183, Ex. D; P. R. p. 189, Ex. G). Furthermore, the supreme court of Washington recently said in *Ins. Co. v. Casualty Co.*, 159 Pac. (Wash.) 788, at 789:

“The duties of a receiver are to take charge of, and safely keep and account for, *all of the assets* of the estate and to abide all orders of the court with reference thereto.”

Moreover, it would be illogical that they could hold the property in Washington as assignees for the benefit of creditors, without accounting to their appointive court, when the conveyance was made to them in their official capacity and *not otherwise*. Under the laws of Washington, a receiver may set aside a voluntary assignment made for the benefit of creditors, regardless of whether any fraud was intended, as he is entitled to all of the assets of the estate (*Olson v. Bank*, 15 Wash. 148, 45 Pac. 734). It logically follows that the converse is true, *i. e.*: a receiver having been appointed, the corporation could not assign its property for the benefit of creditors and keep the receiver from taking them in his official capacity as receiver. There is no question that the corporation or at least its corporate officers in Washington could not assign its assets so as to prevent the receivers from taking title as receivers. (High Receivers, 4th ed., Secs. 346, 447, 448.) However, if the corporation had refused to make the conveyance as directed by the court, it, or at least its corporate officers in the jurisdiction of the Washing-

ton court, would have been in contempt of court. (34 Cyc. 215.)

The case at bar is even stronger than the facts in *Huntington v. C. & O. Ry.*, 98 Fed. 459. In that case there was an actual corporate resolution ratifying the assignment. In this case there is no record of any corporate act ratifying the assignment. In that case there was no application of the receiver for the transfer. In this case the order recites that it came on upon application of the court's officers, the receivers. In both cases the conveyance was made to the receivers in their official capacity, and in the case at bar the conveyance was worded "pursuant to the order of the court" and to the receivers and "not otherwise." In that case the action was instituted by a stockholder to wind the corporation up. In this case a creditor instituted the action and the corporation, according to the judicial records, which is the only competent evidence, actually appeared in court and resisted the petition and prayed that the action be dismissed and that it recover its costs. Under the circumstances the court will not inquire whether the corporation was more or less willing to convey all its assets to the receivers.

In that case (*Huntington v. C. & O. Ry.*, 98 Fed. 459) the court said, at pages 463, 464:

"In form, the suit is adversary and involuntary, and it is not for this court to inquire whether the corporation was more or less willing

or unwilling that the prayer of the complaint should be granted. The plaintiff had appealed to the court, and, if he had a good cause of action, the relief must necessarily be granted, whether resisted by defendant or not. This fact, and the form of the suit, settles its character. \* \* \* The deed itself, by its terms and by being executed to the receiver in his official capacity, excludes any such idea as that it was executed as an original voluntary assignment for the benefit of the creditors of the company."

To the same effect, see: *Zacher v. Fidelity, etc., Co.*, 59 S. W. 493, 106 Fed. 593.

It is very evident that if the court in *Ward v. Connecticut Pipe Co.*, 41 Atl. 1057, had had before it the facts that exist in this case, *i. e.*: that a creditor (Nevin) had applied for a receiver, which application had been resisted, and the court, after a hearing, had granted the application, that it would have held the assignment to be involuntary, for it says:

"If the assignment by the defendant to the receiver had been forced upon it at the instance of a creditor, this might have been an (*in invitum*) proceeding."

As it was, the case was decided upon the point that the receiver had been appointed upon a specific finding that it was for the best interests of the stockholders, in accordance with a statute which provided that upon a certain showing a stockholder might have the corporation wound up.

In *Young v. Clapp*, 32 N. E. (Ill.) 187, 189, rehearing denied in 35 N. E. 372, wherein the facts were: On same day eight judgments were entered on eight judgment notes; execution issued on each judgment, four of which were levied, and four returned *nulla bona*; three out of the last four judgment (execution) creditors filed creditor's bill and had receiver appointed; an order was also entered on same day requiring defendants to transfer and deliver their property to receiver, which was afterwards obeyed; the defendants filed no answer to the bill; the court said:

“A transfer made by the judgment debtor to the receiver in a creditor's bill under the order of the court is not an assignment executed for the benefit of creditors, but rather for the payment of judgments owned by the complainants in the suit, subject to liens, if any, existing before the filing of the bill. By such transfer the receiver does not become the agent of the debtor for the distribution of the property in the sense in which the assignee becomes the agent of the assignor when there is a general assignment for the benefit of creditors.”

But, as stated by the Supreme Court of the United States in *Security Trust Co. v. Dodd*, 173 U. S. at 635 (discussed more fully *infra*):

“It makes no difference whether the estate of the insolvent is vested in the foreign assignee under proceedings instituted against the insolvent or upon the voluntary application of the insolvent himself. The assignee is still the agent of the law and derives from it his authority.



\* \* \* It cannot be supported as to creditors who have not assented, and who are at liberty to pursue their remedies against such property of the assignor as they may find in other states."

See also:

High Receivers, Sec. 240, p. 276;

*Catlin v. Wilcox Silver Plate Co.*, 24 N. E. 250.

(C) *Recognition will not be extended to foreign receiver when detriment is thereby caused to local creditors.*

This rule is stated so cogently by Mr. High in his work, both as to the principle and reason, that we quote it without further comment:

"The better doctrine upon the subject of extra-territorial powers of receivers undoubtedly is that the legal authority of a receiver is co-extensive only with the jurisdiction of the court appointing him and that as a matter of strict right, the courts of one state are not bound to recognize a receiver appointed in a foreign state. The rule is founded upon the recognized principle that the laws of one state have no force, *proprio vigore*, beyond the territorial limits of such state, although upon considerations of courtesy or comity they may be permitted to operate in another state for the promotion of justice, *when neither the latter state nor its citizens will suffer any inconvenience* from the application of the foreign law. The question then becomes one of comity between the different states, and it is upon such considerations alone that the courts of one state may recognize and enforce the acts

of a receiver appointed in another state, *when no detriment is thereby caused to the citizens of the state* in which the functions of the foreign receiver are asserted."

High Receivers, 4th ed., Sec. 47;

*Hoyt v. Thompson*, 5 N. Y. 320.

The cases which are consonant with this doctrine are multitudinous. We cite some of them:

34 Cyc. 488, 489, 490, 491;

Cook on Corporations, Sec. 871;

*Commercial Nat. Bank v. Matherwell*, 31 S. W. 1002;

*Grogan v. Egbert*, 28 S. E. 715;

*Fawcett v. Iron Hall*, 29 Atl. 914;

*Failey v. Fee*, 34 Atl. 842;

*Stockbridge v. Beckwith*, 33 Atl. 620;

*Frowert v. Blank*, 54 Atl. 1000;

*Frowert v. Blank*, 49 Atl. 302;

*Linville v. Madden*, 41 Atl. 1097;

*Irwin v. Association*, 38 Atl. 680;

*Lackmann v. Supreme Council*, 75 Pac. (Cal.) 583;

*Humphreys v. Hopkins*, 22 Pac. (Cal.) 893;

*Thum v. Pingree*, 61 Pac. (Utah) 18;  
*Ward v. Ins. Co.*, 67 Pac. (Cal.) 124;  
 Beach on Receivers, Sec. 267, 268;  
*Fowler v. Osgood*, 141 Fed. 20;  
*Wigton v. Bosler*, 102 Fed. 71;  
 23 Am. & Eng. Encyc. 1107, 1108, 1123;  
*Hieronymons Bros. v. Ins. Co.*, 60 So. 452;  
*Coal, etc., Co. v. Reherd*, 204 Fed. 859, 882;  
*Fairview, etc., Co. v. Ulrich*, 192 Fed. 894;  
*Hazelett v. Woodhead*, 67 Atl. 136;  
*Booth v. Clark*, 15 L. ed. (U. S.) 164;  
 Modern Am. Law, Vol. 9, p. 480.

(D) *Foreign statutable assignments for benefit of creditors, whether voluntary or involuntary, will be given no effect as against local creditors.*

The rule is in actuality even stronger than that stated by us, as the decisions of the United States Supreme Court are that such assignments will not be given effect as against any creditors pursuing their remedies in the state where it is sought to be enforced. The reason of the rule is plain: the enforcement is only by virtue of comity, as the laws of the foreign state have no force outside its boundaries, and comity does not require any government

to impair the remedies or lessen the securities of its own citizens.

While there is an abundance of authority, the rule is clearly stated in *Security Trust Co. v. Dodd*, 173 U. S. 624, which case is more fully discussed *infra*, wherein the court said:

“The prevailing American doctrine is that a conveyance under a state insolvent law operates only upon property within the territory of that state, and that with respect to property in other states it is given only such effect as the laws of such state permit; and that, in general, it must give way to claims of creditors pursuing their remedies there. It passes no title to real estate situated in another state. Nor as to personal property, will the title acquired by it prevail against the rights of attaching creditors under the laws of the state where the property is actually situated. As was said by Mr. Justice McLean in *Oakey v. Bennet*, 11 How. 33, 44, ‘A statutable conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principle of comity; and national comity does not require any government to give effect to such assignment when it shall impair the remedies or lessen the securities of its own citizens.’ And this is the prevailing doctrine of this country. A proceeding *in rem* against the property of a foreign bankrupt, under our local laws, may be maintained by creditors, notwithstanding the foreign assignment. \* \* \* the weight of authority is, as already stated, that it makes no difference whether the estate of the insolvent is vested in the foreign assignee under proceedings instituted against the insolvent or upon the voluntary ap-



plication of the insolvent himself. The assignee is still the agent of the law, and derives from it his authority."

12 Enc. of U. S. Sup. Ct. Repts. 627.

This case was approvingly quoted in *The Disconto Gesellschaft v. Umbreit*, 208 U. S. 570, 52 L. ed. 628, 629.

Other cases to the same effect are:

*Happy v. Prickett*, 64 Pac. (Wash.) 528;

*In re Waites*, 2 N. E. (N. Y.) 440;

*Bloomingdale v. Weil*, 70 Pac. (Wash.) 95,  
at 101;

4 Cyc. 227;

*Taylor v. Ins. Co.*, 96 Mass. 354, 14 Allen 354;

*Catlin v. Wilcox-Silver Plate Co.*, 24 N. E.  
250;

*Olney v. Tanner*, 10 Fed. 104;

Burrill on Assignments, pp. 363, 367;

*Chaffee v. Bank*, 36 Am. Rep. 345;

*McClure v. Campbell*, 37 N. W. (Wisc.) 343;

2 R. C. L., Assignments for Benefit of Creditors, Sec. 42.

(E) *An assignment for benefit of creditors made pursuant to an order of court in a receiver or foreign insolvency proceedings will, as against local creditors, be given only the same effect as would be given to the proceedings themselves, i. e.: it will not be enforced to the detriment of local creditors.*

We urge that, even without the support of authorities, this proposition logically follows from the facts and authorities discussed in subheadings *B, C* and *D*. However, it is supported by respectable authority, as it is reasonable that a conveyance made pursuant to an order could have no wider extra-territorial effect than the order itself; and that the order could have no wider effect than the proceedings of which it was a part. In other words, that the conveyance would simply be a part of the proceedings of the foreign court and would be limited the same as the proceedings upon which it depended.

Mr. High in his work on Receivers says:

“Nor in such case, does the fact that the firm has executed an assignment of all its effects to the receiver vary the rule, since such assignment, as against non-resident creditors, confers upon the receiver no better title than that acquired under the order appointing him.”

High Receivers, p. 276, Sec. 240 (4th ed.),  
also p. 629;

*Catlin v. Wilcox-Silver Plate Co.*, 24 N. E.  
250, *supra*.

In 34 Cyc. at page 493 it is said:

“Rights of creditors to proceed in a state other than that in which the receiver was appointed are not affected by involuntary assignments executed under the orders of the appointing court, and such receivers will not be recognized to defeat the preference of such creditors.” See also:

*Huntington v. C. & O. Ry.*, 98 Fed. 459,  
*supra*;

*Zacher v. Fidelity, etc., Co.*, 59 S. W. 493, 106  
Fed. 593, *supra*.

(E) *Comity will not be extended in any event when it is not reciprocated.*

There is a further serious and fatal defect in plaintiffs' position, and that is: That if the facts were reversed and McDonald stood in his present position, but was a citizen of Washington, and the plaintiffs stood in their present position, but were citizens of Alaska, and the proceedings under which they assert their claim had been had in Alaska, then the plaintiffs would not be accorded by the Washington courts that which they now claim the Alaska courts ought to extend to them.

In *Happy v. Prickett*, 64 Pac. (Wash.) 528, at 531, the court said:

“But we think that the great weight of authority, as well as the better reasoning, is in favor of the conclusion that rights under statut-

able assignments will be protected in a foreign state, *subject to the rights of local creditors.*”

It is true the Washington supreme court reversed the decision of the trial court, but it was on the ground that the local creditor should be obliged to prove that he had a just claim. In this case plaintiffs admit that McDonald has a just claim against the corporation. (Complaint and Reply, P. R. pp. 12 and 23.)

In a more recent decision, the Washington supreme court reiterated this doctrine in even more strong language, saying:

“We think, however, that the supreme court of the United States and the cases referred to in the case of *Barnett v. Kinney* \* \* \* lays down a better rule and that *foreign creditors should not be accorded* the same rights as to local creditors simply because they have availed themselves of the process of the courts of our state to seize the property of the insolvent within the state. We do not think that there is any substantial difference between the assignments of real and personal property, and we so intimate in *Happy v. Prickett*, *supra*. *The rights of local creditors prevail against foreign assignments*, and, in addition, as said in *Trust Co. v. Dodd*, *supra*, such assignments must not conflict with the laws or public policy of the state in which the assignment is sought to be enforced. If it does, it is a good reason for refusing to extend the comity of the state in favor of such conveyance.”

*Bloomingtondale v. Weil*, 70 Pac. (Wash.) 95.  
*loc. cit.* 101.



Under such circumstances, the courts of Alaska certainly should not extend their comity to such an extent as to prejudice the rights of local creditors in Alaska.

In *Hale v. Allison*, 188 U. S. 56, p. 71, 47 L. ed. 380, the Supreme Court of the United States said:

“The question of comity cannot avail in a case where the courts of the state in which the receiver was appointed hold that an action similar to the one brought in the foreign jurisdiction cannot be maintained by him in the courts of the state of his appointment.”

A case decidedly in point is *In re John L. Nelson & Bro. Co.*, 149 Fed. 593, wherein the court said:

“It appears to be firmly established in Illinois that, even in the case of a voluntary foreign assignment, it is contrary to the policy of Illinois law to allow the property or funds of a non-resident debtor to be withdrawn from that state before his creditors residing there have been paid, and thus compel them to seek redress in a foreign jurisdiction. And these decisions have been recognized by the federal courts sitting in Illinois. It thus appears that, were the situations reversed, a New York assignee would not be permitted to recover funds of his assignor situated in Illinois as against attaching creditors in that state. The rule of granting to assignments for the benefit of creditors extra-territorial vitality rests upon principles of comity. *Faulkner v. Hyman*, 142 Mass. 54. It involves reciprocity, and it appears to me to be clearly against the policy of any state to grant to the citizens of another jurisdiction a priv-

ilege from which its own citizens are debarred by the repeated decisions of the highest court of said jurisdiction. I am, therefore, of opinion that, upon principles of public policy, the claims of the attaching creditors are to be preferred to that of the assignor."

## II.

VOLUNTARY OR COMMON-LAW ASSIGNMENTS FOR BENEFIT OF CREDITORS WILL NOT BE RESPECTED IN OTHER STATES WHEN THEY COME IN CONFLICT WITH THE RIGHTS OF LOCAL CREDITORS, OR WITH THE LAWS OR PUBLIC POLICY OF THE STATE IN WHICH THE ASSIGNMENT IS SOUGHT TO BE ENFORCED.

(A) *Voluntary or common-law assignments receive recognition in other states only as a matter of comity.*

Before proceeding with the argument, it is well to call attention to the clearly demonstrated fallaciousness of plaintiffs' contention. Plaintiffs assert that a common-law assignment is valid in both Washington and Alaska, and that therefore such an assignment made in Washington conveys personal property everywhere (in this case, in Alaska), on the theory that the situs of the personal property is the domicile of the owner. However, in the face of this contention, plaintiffs admit that the Pacific Coast & Norway Packing Company is a citizen of the state of Minnesota (Complaint, P.

R. p. 1) and not of the state of Washington. The domicile of the corporation thus being Minnesota, we submit that plaintiffs' argument, if otherwise good, would have to be based upon the fact that the assignment was a common-law assignment good in Minnesota. This, however, they nowhere claim.

The plaintiffs in the case are seeking to take personal property out of Alaska and into Washington, and they say that when they ask the Alaska courts to grant them this that they are not asking the court to exercise or extend comity. However, the recognition in a foreign state of even such an assignment as plaintiffs claim is a "*mere principle of comity*" and "*after all, there is no absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed.*"

*Green v. Van Buskirk*, 5 Wall. 307, 16 L. ed. 599.

This doctrine has been reaffirmed by a recent well-considered case of the Supreme Court, which will be fully referred to hereafter, wherein Mr. Justice Day, speaking for a unanimous court, said:

"But what property may be removed from a state and subjected to the claims of creditors of other states is a matter of comity between nations and states, and not a matter of absolute right in favor of creditors of another sovereignty, when citizens of the local state or country are asserting rights against property within the local jurisdiction."

*The Disconto Gesellschaft v. Umbreit*, 208  
U. S. 570; 52 L. ed. 628.

This is the identical situation in the case at bar, i. e.: plaintiffs are endeavoring to remove the vessel *Bernice*, or the proceeds from the sale of her, to Washington, there to be subjected to the claims of creditors of other states than Alaska. We respectfully submit that the trial court in Alaska was bound to follow the controlling weight of authorities from the United States supreme court, regardless of state decisions; and that the matter involved is clearly a matter of comity.

(B) *Comity will not be extended to the recognition of common-law or voluntary assignments to the prejudice of local creditors.*

Although we maintain that the transfer in question was an in invitum proceeding and was made because ordered to be made in the receivership proceedings of which it was a part, and that the corporation had no alternative than to obey the order, at the same time, even if the transfer were a voluntary or common-law assignment, it would not be respected when it came in conflict with the rights of local creditors, or with the laws or public policy of the state where sought to be enforced.

Plaintiffs cite cases which they claim support a contrary doctrine than that just announced. However, the facts in many of their cited cases are in-



herently different from the facts in the case at bar. In *Bank v. Lounge Co.*, 47 N. E. 846; *Clark v. Peat Co.*, 35 Conn. 303; *Moore v. Land Co.*, 33 Atl. 641; and in *Roberts v. Norcross*, 45 Atl. 561, the thing attached is indicated in the decision to have been a debt, which was payable in the state of the assignment. In the last named case the rights of a local creditor were not involved. In *Johnson v. Sharp*, 31 Ohio St. 617, the assignment was prepared in Ohio in accordance with the Ohio statute and ran to an Ohio creditor, and was executed outside of the state simply because the assignor was not in Ohio. In *Byers v. Tabb*, 25 So. 492, and *Atherton v. Ives*, 20 Fed. 894, the local attaching creditor had actual notice of the assignment; and in *Van Wyck v. Read*, 43 Fed. 716, the note assigned was actually in New York, the place of the assignment, and further the note was assigned over by endorsement.

There is a vast distinction between such facts and the facts in the case at bar. In the latter plaintiffs admit that the personal property has been at all times involved in Alaska (Reply, P. R. p. 23; Dep. Smith, P. R. p. 100; Dep. Kells, P. R. p. 74; Dep. Schoenwald, P. R. p. 158), and that it has not been during any of those times in the state of Washington (Dep. Smith, P. R. p. 100; Dep. Steberg, P. R. p. 85; Dep. Kells, P. R. p. 74; Dep. Schoenwald, P. R. p. 158), and that Minnesota is the home of the corporation (Complaint, P. R. p. 1), and that

McDonald had no notice of the assignment (Ev. Burton, P. R. pp. 136, 142, 143, 144 and 147.)

However, although cases from state courts may exist pro and con on the question, neither argument nor discussion can avail the plaintiffs, as the rule has been well settled by the United States Supreme Court in *Security Trust Co. v. Dodd*, 173 U. S. 625, in which case at least five of the cases relied on by plaintiffs were before the court and were, in fact, referred to in its unanimous opinion. It is significant to note that the corporation assignor in that case was a citizen of Minnesota the same as the corporation in the case at bar, which is worth bearing in mind in connection with the facts which were as follows:

Merrill Company, having become insolvent and unable to pay its debts in usual course of business, made assignment under laws of Minnesota to plaintiff Security Trust Co. on September 23, 1893. Security Trust Co. as assignee disposed of all Minnesota property for benefit of creditors. Merrill Company was indebted to Dodd, Mead & Co. of New York; also to Mudge & Sons, a Boston partnership. Mudge & Sons assigned their claim to Dodd, Mead & Co. Prior to assignment Merrill Company was owner of personal property for the value of which suit in controversy was brought, which property was in custody and possession of Mudge & Sons in Boston. Mudge & Sons were in-

formed of the assignment prior to March 8, 1894, and at about that date a notice was served on them by one Merrill (an individual) to the effect that he took possession of the property in their custody for and on behalf of the assignee Security Trust Co. Dodd, Mead & Co. had full knowledge of the execution and filing of the assignment by Merrill Company to Security Trust Co. On March 8, 1894, Dodd, Mead & Co. commenced action against Merrill Company in Massachusetts upon their indebtedness and seized by attachment the property in custody of Mudge & Sons, which property was later sold to the execution creditors Dodd, Mead & Co.

The Circuit Court of Appeals certified to the Supreme Court the following questions:

“First: Did the execution and delivery of the aforesaid deed of assignment by the D. D. Merrill Company to the Security Trust Company and the acceptance of the same by the latter company and its qualification as assignee thereunder, vest said assignee with the title to the personal property aforesaid, then located in the State of Massachusetts, and in the custody and possession of said Mudge & Sons?

“Second: Did the execution and delivery of said assignment and the acceptance thereof by the assignee and its qualification thereunder, in the manner aforesaid, together with the notice of such assignment which was given, as aforesaid to Alfred Mudge & Sons prior to March 8, 1894, vest the Security Trust Company with such a title to the personal property aforesaid on said March 8, 1894, that it could not on said day be lawfully seized by attachment under pro

cess issued by the superior court of Suffolk County, Massachusetts, in a suit instituted therein by creditors of the D. D. Merrill Company, who were residents and citizens of the state of New York, and who had notice of the assignment but had not proven their claim against the assigned estate nor filed a release of their claim?"

The Court, speaking through Mr. Justice Brown, at pages 628 and 629 of 173 U. S., said:

"The operation of *voluntary or common-law assignments* upon property situated in other states has been the subject of frequent discussion in the courts, and there is a general consensus of opinion to the effect that *such assignments* will be respected, *except* so far as they come in conflict with the rights of local creditors, or with the laws or public policy of the state in which the assignment is sought to be enforced."

The Court then went on and further said that statutable assignments would only be given such effect as the laws of the state in which it was sought to be enforced would permit. The Court made no distinction between voluntary and common-law assignments, and apparently considered that they had no differentiating qualities at least in their effect in another state, as it says that such assignments will be respected except under three circumstances: 1. when they come in conflict with the rights of local creditors; 2, when they come in conflict with the laws; and, 3, when they come in conflict with the public policy.



In consideration with this case it should be borne in mind that McDonald was a local (Alaskan) creditor (Dep. Steberg, P. R. 88); that he at no time favored the transfer (Dep. Smith, P. R. p. 98); and that he has not at any time been a party to, or in any manner acquiesced in or assented to, instigated, endorsed or ratified, or received any advantage or benefit whatsoever flowing from said receivership and assignment, or either of them, and that neither of the defendants had any notice of the conveyance. (P. R. p. 219, finding No. 13, which plaintiffs do not urge as erroneous, and we therefore urge must be deemed correct.)

Although the trial court's interpretation of *Security Trust Co. v. Dodd*, *supra*, is criticized by plaintiffs, a similar interpretation has been placed upon it by some very eminent authorities.

The authors of the Encyclopedia of United States Supreme Reports, in volume 2, at page 626, so reported it.

The author of Cook on Corporations (6th ed. Vol. 3, Sec. 871, p. 3098, note 1) likewise so interpreted it.

See, also, to the same effect:

*Smith v. Burz*, 125 Ill. App. 122;

*Sheldon v. Wheeler*, 32 Fed. 773;

*Shinler v. Israel*, 27 Fed. 857;

3 *Am. & Eng. Enc.* (2d ed.) 49;

*Faulkner v. Hyman*, 6 N. E. (Mass.) 846.

And in *Bank v. McLeod*, 38 Ohio St. R. 182, the court said:

“The courts of Ohio, while allowing the comity of suit on a contract not in contravention of our laws or public policy, will protect the rights of our own residents and will not allow the principle of comity to impede or impair those rights.”

Plaintiffs assert that if the Supreme Court held in *Security Trust Co. v. Dodd*, *supra*, as interpreted by the trial court, in any event the ruling has been repudiated by the later case of *Blake v. McClung*, 176 U. S. 59, which they cite in connection with *Sully v. Am. Nat. Bank*, 178 U. S. 289, and *Maynard v. Granite, etc., Ass'n*, 92 Fed. 435, on the theory, we take it, that to give defendant McDonald a right to enforce his remedies by means of the vessel *Bernice* would be unconstitutional because he might obtain a larger pro rata of his debt than some other creditor, say, in Washington. The cases cited by plaintiffs are easily distinguishable from the cases consonant with the decision of the trial court.

In the former, a state passed a law in effect that no non-resident should receive any part of his debt out of the corporation's property situated in the state until the citizens of the state were paid in full, which is virtually saying that non-residents shall not be allowed to use the local courts.

In the latter, the rule is that a foreigner shall not come into a state and take the corporation's property, upon which the local creditor may have extended his credit, away from the state and into a foreign jurisdiction, thus compelling the local creditor to go into a foreign jurisdiction to obtain payment of his debt, without first giving him an opportunity to enforce his remedies through the courts of his own state against the property in his own state.

However, if the Supreme Court did intend by *Blake v. McClung*, *supra*, to repudiate its opinion in *Security Trust Co. v. Dodd*, *supra*, it can be confidently asserted that the doctrine of the latter case has now been re-established by the comparatively recent case of *The Disconto Gesellschaft v. Umbreit*, 208 U. S. 570; and if it can be said with propriety that *Blake v. McClung* overruled *Security Trust Co. v. Dodd*, then it can be said with equal propriety that *Blake v. McClung* has been overruled by *The Disconto Gesellschaft v. Umbreit*. The facts in the last named case were as follows:

Plaintiff, a German corporation, commenced action against debtor in Wisconsin on August 17, 1901, and garnisheed funds in bank on same date; judgment was rendered in favor of plaintiff in that action on February 19, 1904; plaintiff on August 21, 1901, was appointed a member of committee of creditors of debtor in bankruptcy proceedings in

Germany; plaintiff's claim, though presented, had not been paid by bankruptcy estate.

Defendant, a citizen and resident of Wisconsin, commenced suit on March 21, 1904, against debtor for recovery of services rendered between August 16, 1901, and February 1, 1903; he garnisheed funds in same bank on March 22, 1904.

Defendant's claim, therefore, arose after plaintiff had attached, and defendant's attachment was nearly three years after plaintiff's.

The Supreme Court of the United States, speaking through Mr. Justice Day, at pages 628 and 629 of 52 L. ed. (208 U. S. 570), said:

“But what property may be removed from a state and subjected to the claims of creditors of other states is a matter of comity between nations and states, and not a matter of absolute right in favor of creditors of another sovereignty, when citizens of the local state or country are asserting rights against property within the local jurisdiction.

“‘Comity’ in the legal sense,” says Mr. Justice Gray, speaking for this court in *Hilton v. Guyot*, 159 U. S. 113, 163; 40 L. ed. 95, 108, “is neither a matter of absolute obligation on the one hand nor of mere courtesy and good will upon the other. But it is the recognition which one national allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”



“In the elaborate examination of the subject in that case many cases are cited and the writings of leading authors on the subject extensively quoted as to the nature, obligation, and extent of comity between nations and states. The result of the discussion shows that how far foreign creditors will be protected and their rights enforced depends upon the circumstances of each case, and that all civilized nations have recognized and enforced the doctrine that international comity does not require the enforcement of judgments in such wise as to *prejudice the rights of local creditors and the superior claims of such creditors to assert and enforce demands against property within the local jurisdiction*. Such recognition is not inconsistent with the moral duty to respect the rights of foreign citizens which inheres in the law of nations. Speaking of the doctrine, Mr. Justice Story says: ‘Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasion on which its exercise may be justly demanded.’ Story, Conf. L. Par. 33.

“The doctrine of comity has been the subject of frequent discussion in the courts of this country when it has been sought to assert rights accruing under assignments for the benefit of creditors in other states as *against the demands of local creditors, by attachment or otherwise in the state where the property is situated*. The cases were reviewed by Mr. Justice Brown, delivering the opinion of the court in *Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. ed. 835, 19 Sup. Ct. Rep. 545, and the conclusion reached that voluntary assignments for the benefit of creditors should be given force in other states as to property therein situate, *except* so far as they come in *conflict with the rights of local creditors*, or with the public policy of the state in which it is sought to be enforced; and, as

was said by Mr. Justice McLean in *Oakey v. Bennett*, 11 How. 33, 44; 13 L. ed. 593, 597, 'national comity does not require any government to give effect to such assignment (for the benefit of creditors) *when it shall impair the remedies or lessen the securities of its own citizens.*'

"There being, then, *no provision of positive law* requiring the recognition of the right of the plaintiff in error to appropriate property in the state of Wisconsin and subject it to distribution for the benefit of foreign creditors as against the demands of local creditors, how far the public policy of the state permitted such recognition was a matter for the state to determine for itself. In determining that the policy of Wisconsin would not permit the property to be thus appropriated to the benefit of alien creditors as against the demands of the citizens of the state, the supreme court of Wisconsin has done no more than has been frequently done by nations and *states* in refusing to exercise the doctrine of comity in such wise as to impair the rights of local creditors to subject local property to their just claims. We fail to perceive how this application of a *well-known rule* can be said to deprive the plaintiff in error of its property without due process of law."

It occurs to us that this case is a complete answer to plaintiffs' contention. There is no contention that McDonald does not have a just claim against the corporation, and the pleadings admit that the property was duly attached by defendant Bishop in an action brought by defendant McDonald against the corporation, and that McDonald duly obtained a judgment, and that said judgment order-

ed and adjudged that the property be sold by Bishop as Marshal to satisfy the demands of McDonald (Answer, Par. 2, 3 and 4, P. R. pp. 11, 12 and 13; no denial in the reply, P. R. p. 23). The judgment was in accordance with the code of civil procedure provided by Congress for Alaska, Sec. 979, C. L. A., Carter Code, Sec. 147, providing:

“If judgment be recovered by plaintiff, and it shall appear that the property has been attached in the action and has not been sold as perishable property or discharged from the attachment as provided by law, the court shall order and adjudge the property to be sold to satisfy the plaintiff’s demands, \* \* \*.”

McDonald is a local creditor (Dep. Steberg, P. R. p. 88); and if plaintiffs prevail his remedies on his just claim will be impaired and his securities, i. e., attachment and judgment liens, will be entirely destroyed, and there is no provision of positive law in Alaska requiring the recognition of plaintiffs’ alleged right to take the property to Washington and there distribute it for the benefit of non-Alaskan creditors.

As said by the supreme court of Washington, in a case where no rights of local creditors were involved, but in which a voluntary assignment made in New York was in controversy:

“Foreign creditors should not be accorded the same rights as *those accorded* (italics ours) to local creditors simply because they have avail-

ed themselves of the process of the courts of our state to seize the property of the insolvent within the state. \* \* \* *The rights of local creditors prevail* against foreign assignments, and *in addition*, as said in *Trust Co. v. Dodd, supra*, such assignments must not conflict with the laws or public policy of the state in which the assignment is sought to be enforced."

*Bloomington v. Weil*, 70 Pac. (Wash.) 94, at 101.

We firmly maintain that it would not be just or fair to compel McDonald to relinquish his attachment and judgment liens and to go forth into the foreign state of Washington in order to obtain payment of his just claim, or a portion of it. This position is supported by respectable authority.

"It is not just or fair to compel creditors in this state to go to a foreign state to receive a pro rata share of the debtor's property when they have extended credit alone upon the faith of the property in this state."

*Whithed v. Thompson Co.*, 86 Ill. A. 76, 56 N. E. 1106; 185 Ill. App. —, 76 Am. S. R. 51.

To the same effect, see:

*Woodard v. Brooks*, 128 Ill. 222; 20 N. E. 685;

*Bizzell v. Bedient*, 4 N. C. 219, 2 L. R. 254. 34 Cyc. 505.



Moreover, as said by the Court in *Baldwin v. Hosmer*, 59 N. W. 437:

“The rule of comity is never allowed to operate when it will contravene the rights of a citizen of the state where the action is being taken.”

To the same effect, see:

*Hilton v. Guyot*, 159 U. S. 113, 40 L. ed. 95;

*Fransen v. Zimmer*, 90 Hun. 103;

*Modern Am. Law*, Vol. 9, p. 475.

### III.

AN UNRECORDED ASSIGNMENT (FOR BENEFIT OF CREDITORS) OF AN AMERICAN VESSEL IS INVALID AS AGAINST A CREDITOR OF THE ASSIGNOR WHO SEEKS TO SEQUESTER THE PROPERTY TO THE SATISFACTION OF HIS DEBT.

However, even if the contention of defendants was not supported by such eminently respectable and weighty authority as enunciated, still the plaintiffs would not be entitled to recover because they failed to record their conveyance in accordance with the Revised Statutes of the United States.

(A) *The property involved was an American licensed vessel, documented and licensed in the Customs District of Alaska.*

The plaintiffs admit that the "Bernice" was at all times involved in the controversy an American licensed vessel of *eleven* net tons, documented and licensed in the United States Customs District of Alaska (See answer, P. R. pp. 11 and 12; reply, P. R. p. 22, as to no denial).

Now, there is no essential distinction between vessels of 5 and 20 tons burden and vessels of over 20 tons burden; in fact, they both are given the same privileges with relation to the coasting trade or fisheries by Section 4311, R. S., U. S., which provides:

"Vessels of 20 tons and upward, enrolled in pursuance of this Title, and having a license in force, or vessels of less than 20 tons, which, although not enrolled having a license in force, as required by this Title, and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries."

Further, it is apparent that no vessel of less than 5 tons can be licensed, and, in fact, the same provisions as to measurement are required of licensed vessels as in registered or enrolled vessels.

"Before any vessel, of the burden of 5 tons, and less than 20 tons, shall be licensed, the same measurements shall be made of such vessel, and the same provisions observed relative thereto, as are to be observed in case of measuring vessels to be registered or enrolled. \* \* \*

Sec. 4331, R. S., U. S.

By the act of Congress of Feb. 29, 1912, Ch. 47, the document of enrollment and license is consolidated into one form.

“That under the direction of the Secretary of Commerce and Labor the Commissioner of Navigation is hereby authorized and directed from time to time to consolidate into one document in the case of any vessel of the United States the form of enrollment prescribed by Sec. 4319 of the Revised Statutes and the form of license prescribed by Sec. 4321 of the Revised Statutes, and such consolidated form shall hereafter be issued to a vessel of the United States in lieu of the separate enrollment and license now prescribed by law, and shall be deemed sufficient compliance with the requirements of laws relating to the subject.”

37 Stat. L. 70.

It being admitted that she is an American licensed vessel, we submit that it must be conceded that she must be classed as an enrolled and licensed vessel, because “American vessels are of two classes: those registered, and those enrolled or licensed.”

*Anderson v. S. S. Co.*, 225 U. S. 187; 25 L. ed. 1047, at 1053;

and being an American licensed vessel that her status is fixed and she comes within the purview of Section 4192, R. S., U. S., which provides:

“No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his

heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of customs where such vessel is registered or enrolled. \* \* \*

In *Fleming v. Sloane*, 110 N. W. (Mich.) 933, the Court said, at page 935:

“The status of the *Hattie* as a vessel of the United States depends upon registry, license, and enrollment, under the statutes cited, and not upon the uses that she may be put to or the accident of idleness. Being a vessel of the United States, her status is fixed, and interested persons may depend upon the record of mortgages in the collector’s office.”

(B) *The transfer was not recorded and the defendants had no actual notice thereof, and it is therefore void as against an attaching creditor.*

Plaintiffs admit that the transfer was not recorded in the office of the collector of customs for the District of Alaska (Dep. Kells, P. R. p. 75; Dep. Smith, P. R. p. 100); and in fact, the record is bare of any proof that the transfer was ever recorded in any customs district. [Indeed, it is evident that plaintiffs could never hope to controvert the fact that the transfer was not recorded in any custom house as the witness Kells, in an answer which was stricken (P. R. p. 111) says: “no record of the bill of sale was made in the custom house.”]

There is likewise an absolute want of proof that the defendants had any notice or knowledge of the



transfer, although plaintiffs' counsel, Mr. Burton, attempted to impute notice to defendants' counsel, Robertson; but, inasmuch as Mr. Burton says, in effect, that he didn't know of the actual execution of the transfer until at least after the attachment proceedings (Ev. Burton, P. R. p. 142), we fail to see how he could have given either actual or constructive notice to Robertson of a fact that he didn't know himself. Furthermore, Mr. Burton says, in effect, that he didn't tell Robertson the property had been transferred (P. R. pp. 136, 144, 147 and 148).

With this state of facts, we think the case is clearly within the rule laid down by the supreme court of the state of Washington, in 1913, in speaking of the section of the Revised Statutes now under discussion, towit:

An unrecorded bill of sale is invalid as against a creditor of the vendor who seeks to sequester the property to the satisfaction of the debt, the phrase any person including the general creditors of the vendor. Recording statutes are remedial and must be liberally construed so as to attain the object intended by them.

*Benner v. Sc. Am. Bank*, 131 Pac. 1149;

*Potter v. Irish*, 10 Gray 416, 76 Mass. 416;

Also,

*Secrist v. German Ins. Co.*, 19 Ohio St. R. 476;

(C) *An assignment for the benefit of creditors is a conveyance within the purview of Section 4192, R. S., U. S.*

Plaintiffs' contention that the transfer is an assignment for the benefit of creditors does not cure their failure to record it, as such an assignment is held to be a conveyance within the purview of the section of the Revised Statutes under discussion.

*Haug v. Bank*, 43 N. W. (Mich.) 939, at 941.

### CONCLUSION.

In conclusion, first calling attention to the well considered opinion of the trial court (P. R. p. 226), we earnestly urge that the plaintiffs are not entitled to prevail on five grounds, the first three of which are included within Point I hereinbefore stated. In brief, these grounds are:

1. The gravamen of plaintiffs' complaint is that they hold a valid title to the property, and the burden was upon them to prove this. However, there was an absolute want of proof that they hold a valid, duly authorized title; in fact, the only competent evidence in the case shows that the transfer was not the corporate act of the corporation.

2. The transfer is a part of an adversary, in invitum proceedings and is in invitum itself, and it will be given only such effect in other states as the laws of such states permit, and must give way to claims of creditors pursuing their remedies there.

3. The courts of the territory of Alaska are not required and ought not be requested to extend comity to citizens of Washington in cases where, if the situations were reversed, the courts of Washington would not extend similar comity to the citizens of Alaska.

4. The transfer, even if it be a voluntary or common-law assignment for benefit of creditors, which we do not concede, will not be respected in other states when it comes in conflict with the rights of local creditors, or with the laws or public policy of the state in which it is sought to be enforced.

5. A conveyance of an American licensed vessel of the description of the vessel in question must, to be valid against general creditors, be duly recorded in the office of the Collector of Customs, unless those creditors have actual notice of said conveyance, which the evidence in this case discloses neither of the defendants had.

In addition to these grounds, the attention of the Court is respectfully called to the fact that there is no contention that the defendant McDonald was not pursuing his remedies on a just claim in accordance with the laws of his own territory, nor is there any contention but that, if the plaintiffs prevail, McDonald will be deprived of those remedies and his securities will be entirely taken away from him.

In the light of the record and of the decisions cited, we earnestly maintain that no prejudicial error or injury was sustained by the plaintiffs, and that it would be unfair and unjust to permit them to prevail as against the defendants. We submit that justice and equity are in union in demanding that the judgment of the trial court be upheld, and we respectfully pray that it be so ordered.

Respectfully submitted,

GUNNISON & ROBERTSON,

*Attorneys for Defendants in Error.*





IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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E. SCHOENWALD and S. T.  
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signees of the Pacific Coast & Nor-  
way Packing Company, a corpora-  
tion,

*Plaintiffs in Error,*

*v.*

HARRY A. BISHOP, as United  
States Marshal for the first divi-  
sion of the district of Alaska, and  
D. N. McDONALD,

*Defendants in Error.*

No. 2817

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UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT OF THE  
DISTRICT OF ALASKA,  
DIVISION NO. 1.

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**Reply Brief of Plaintiffs in Error**

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Seattle, Washington.

NOV 20 1916

H. D. Moulton



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**Reply Brief of Plaintiffs in Error**

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We admit the statement in the first heading of argument in defendants' brief to be law (br. p. 5). But it refers to "statutory and invol-



untary assignments," whereas the case at bar concerns a voluntary common law assignment.

Under this first heading, however, counsel deals with questions having no relation to it. The first is whether the transfer here was the corporation's act. We agree we must show a good title, as counsel contends (ans. br. pp. 6, 7), and in our brief (pp. 9 to 17) we show that the assignment made by the company's president under its seal was its act because approved and acquiesced in by the directors and stockholders, citing numerous authorities to show that even silent acquiescence is sufficient. In this case not only was there acquiescence by the directors and stockholders, but there was consideration of the matter by them in advance, express approval, and cooperation by the company in obtaining the order relating to the transfer. The testimony and the order on its face show that the company consented and cooperated—the testimony is uncontradicted, and the recital of the order clinches it.

*Friedman v. Lesher*, 64 N. E. (Ill.) 736, is cited as adverse to us (ans. br. p. 7). There immediately upon the death of the president of the company the vice president, without any authorization and without any exigency calling for the act, or any motive except to defeat the preference of a judgment note, executed an assignment in the company's name. There was no ratification of any kind until after

the note had been reduced to judgment and its lien had attached. The court did not decide that ratification did not validate the act, or consider what would amount to ratification, but simply that it would not apply the doctrine of relation back to defeat a lien already attached. In the case at bar the ratification by approval and consent was at the time of the transfer and there were several months of acquiescence before the defendants in error levied the attachment. We agree "the general rule is that a corporate assignment must be executed by the board of directors" etc., but we have shown an exception to the general rule.

In the next case cited, *Calumet Paper Co. v. Haskell*, 144 Mo. 331, as is stated there was some evidence to show ratification of the assignment by the stockholders, but it is not shown what the evidence was and the court does not find whether it was sufficient or not. We admit the doctrine of the quotation from this case that we were obliged to show at least an assignment valid on its face, and that when not made by the directors at a duly convened meeting an assignment may be impeached by creditors or stockholders "*when such an assignment has not been validated by acquiescence or laches.*" But the act here *was* validated by approval and acquiescence. A creditor of course can show that there was *no* assignment—no act by the corporation; but when a corporation adopts an act—makes

it its own by approval and acquiescence, then a creditor cannot object to or take advantage of the irregular manner of the corporation's action. He may show that an assignment was no act of the corporation; but when it is the act of the corporation by approval and acquiescence, he cannot impeach it by showing that it was an irregular act. Counsel's authority clearly implies this and our numerous authorities are squarely in point.

The sufficiency of our evidence to show acquiescence is questioned (ans. br. p. 9). Counsel however is much mistaken as to what the evidence was on the point. We showed that the company itself, its directors and stockholders, initiated the receivership proceedings, and arranged a friendly suit to carry out their plans (dep. Kells, rec. p. 66, Steberg, rec. p. 83); that the transfer was made because the control of the company's affairs by the receivers at Seattle was desired by both the directors and stockholders, and "*it (the transfer) was approved and acquiesced in by both*" (dep. Kells, rec. pp. 69-70). "Everybody desired this and approved of transferring the Alaska assets to the receivers. All the directors approved of this, and so far as my knowledge went all the stockholders did. I personally know that a large majority of the stockholders did" (dep. Steberg, rec. p. 84). And note the testimony of the other witnesses to the same effect (dep. Smith, rec. pp. 95-96; Schoenwald,

rec. pp. 153-154). Remember that the defendants in error offered no testimony, and so this all stands undisputed. And it will be remembered that the order relating to the transfer recites the consent of the company by its president, which conclusively shows the company's approval. This evidence puts our case in altogether a different class from that of *Doernbecher v. Co.*, 28 Pac. 899, cited in answer brief p. 9. We admit its authority for the proposition that a creditor can show there was no act of the company, but we repeat our case is one in which the corporation made the president's act its own by approval and acquiescence. Its manner of acting may have been irregular, but that is of no concern except to its members, who in this case have approved and acquiesced.

Subhead "B," ans. br. p. 10, announces that a transfer in a receivership proceeding to the receivers pursuant to an order of court is not a voluntary assignment. No authority cited by counsel grounds any such doctrine. Our case of *Ward v. Mfg. Co.*, 41 Atl. 1057, is to the contrary. There a transfer was made (to use counsel's words) "in a receivership proceeding by a corporation to its receivers pursuant to an order of the court," and the transfer was held voluntary and binding as "an exercise of the *jus disponendi* which is incident to ownership." So far as we can learn not court has questioned the authority of that case. It was urged



and considered before the C. C. A. 6th Circuit, in the case of *Zacher v. Co.*, 106 Fed. 593, and the court did not dispute its soundness.

Counsel remarks (p. 11) that the company here did not confess judgment and did not permit default to be taken against it. The first might have been an act of bankruptcy, and the latter would have required time. Instead an answer was filed which did not deny one material allegation bearing on the question of the appointment of a receiver, *but admits everything which the court recites as the basis of its order appointing a receiver* (rec. pp. 179-181). The record shows that the complaint and answer and the order appointing the receiver were all filed the same day, thus confirming what the testimony shows, that the suit was a prearranged friendly proceeding.

We do not question that as a memorial a record is conclusive. The rule in all its phases is found in Bigelow on Estoppel 5th ed. p. 35. Counsel's cases cover but one aspect of it. But we are not questioning anything shown by or recited in the record. We supply facts not of record concerning transactions prior to the court proceedings and leading up to the record. Everything in the record is consistent with the proofs that the company desired to distribute its assets through a receiver and arranged to have Nevin go into court and make the applica-

tion, thus itself voluntarily initiating the proceedings. In fact the record confirms this since, as said, the company's answer admitted everything which the order recites as a basis for appointing receivers, and the pleadings were filed the same day, and the receiver at once appointed, showing prearrangement and cooperation. The testimony and record confirm each other and show that the proceedings were initiated by the company prior to the application in court, which was but an intermediate step, and that the company by this means "placed the goods which were [the receivership's] subject precisely where the defendant wished to have them placed—at the disposal of one representing primarily all its creditors, and secondarily, all its shareholders." This, the Ward case decides, stamps the proceedings as voluntary and a transfer, although by the court's order within the proceedings, also voluntary and binding as a free exercise of ownership.

Of course we do not deny what the record shows, that Nevin a creditor made the application, but the further established fact is that prior to this the company desired a receivership, planned to have one and arranged with Nevin to accomplish this purpose, and he went into court at its instance. In short, the receivership, just as the record shows it, was a part of the company's plan. Having willed and initiated the proceedings, it willed everything in them.

In the Ward case a transfer ordered by the court in the receivership proceedings was held voluntary. True the proceedings there were begun by stockholders. So were they here—by all the stockholders and directors—if the court will but look at the whole history of the matter. And why should it not? The company's voluntary participation was but one step further back. A creditor went into court but as the company's friend, at its instance and with its cooperation. This makes no difference in principle—in both cases the corporate will was accomplished by operations initiated by its voluntary act. (Rec. pp. 66, 83.)

We ask that it be remembered, however, that even were the receivership involuntary the evidence shows the transfer of the Alaska assets was voluntary. No such transfer was required or authorized by the statutes of Washington as part of the receivership proceeding. From this fact and the fact that the assets were in Alaska, it is almost a necessary inference that the court would not and perhaps could not order such a transfer without the company's consent.

At the risk of needless repetition, let us remark once more that we do not question anything in the record with reference to this transfer, as counsel would have the court believe (ans. br. p. 14). We show first that the receivership had operated a con-

siderable time before the transfer of the Alaska assets was thought of, that the company desired to have the Alaska assets also equally distributed to its creditors, and the expedient of a common law transfer for their benefit was decided upon. Had the company chosen some one else as assignee no one could have questioned that the transfer was voluntary. What difference can it make if the company naturally chose the receivers because they could economically handle the Alaska assets in unison with the Washington receivership? Having decided on the transfer and chosen its assignees, the company's president met with the receivers and arranged the details, and the deed and bill of sale were put in process of preparation. All this took place without any court order—in complete independence of the Washington court or statutes. At this stage, however, it was considered that since the receivers were to be assignees the court of their appointment should sanction an arrangement which would vest in them duties and responsibilities outside of those necessary or usual to their office. And so while the instruments were being prepared the company by its president and the receivers went into court and the latter asked for and the company consented to an order covering the transfer, whereupon it was entered. No part of the record except the order at all pertains to the transfer. What have we questioned in the order? We admit the re-



ceivers asked for it. We merely show that this was in accordance with a prearrangement initiated by the company, and that the company was present and cooperating in obtaining the order, which fact the order shows on its face. We admit that the order directs the transfer, but simply show that such an order was desired and arranged for by the company itself, and that it consented to and cooperated in obtaining such an order so that it might accomplish its desired purpose. In short the order was only one of the later steps in the plan of the company to dispose of its Alaska assets, as it freely desired, for the equal benefit of its creditors. This plan was made and was being executed independently of the receivership before any order was entered, and the only point of contact with the receivership was this order, which was not a required or usual part of the proceeding, but was only entered because the company wished the receivers to cooperate with it in accomplishing a purpose beyond the power and scope of the receivership itself. For the evidence see rec. pp. 68-9, 70, 73, 76, 79, 84, 87, 94, 95, 96, 99, 154-5. When we have shown this have we contradicted anything in the order, and have we not shown the transfer is a free exercise by the company of its right of ownership? The fact that the transfer was not provided for or made in accordance with any requirement of law, and that the order on its face shows its voluntary nature, distinguishes our case from

the Kentucky cases relied on by counsel (ans. br. pp. 17-18), where the state court especially notes that the order did not purport to be a consent order. (*Zacher v. Co.*, 59 S. W., see p. 495, col. 2.)

We repeat that whether the receivership was voluntary or not, the transfer which has only an accidental connection with it was voluntary, and being a common law assignment—not statutable—it was universally binding. The fact that the court through its receivers would have control over the assets after the transfer was made, which is urged by counsel (ans. br. pp. 15-16) has no bearing. Even where a statute provides for the disposition of assets after an assignment is made, if it does not provide for the assignment itself, it is a common law transfer and binding as a free act of ownership. *In Re Farrell*, 176 Fed. (C. C. A. 6th Cir.) 505, at pp. 510-11, squarely decides this. And *Ward v. Company*, *supra*, decides that a transfer is voluntary and binding universally “if it placed the goods which were its subject precisely where the defendant wished to have them placed—at the disposal of one representing primarily all its creditors” etc. And in *Whitman v. Mast*, 11 Wash. 318, 326, the court distinguishing between voluntary and involuntary assignments says:

“In the one case the assignor’s property is placed in the hands of a third party by his own act and with his consent; in the other it is placed

in the hands of a third party by operation of law and without his act and against his consent. The subsequent control by the court under statutory regulations does not destroy this distinction. Whether or not an assignment is a voluntary conveyance by the assignor must be decided from a consideration of the manner in which the transfer of the property is made, and not what may be prescribed by the statute as to the manner in which the property is to be disposed of by the assignee after assignment."

We dispute very little found in the answer brief between pp. 19 and 25 inclusive. *Security Trust Co. v. Dodd*, quoted p. 19, concerned a statutable assignment. All the cases under the heading "C" (pp. 20-22) concern the authority of a receiver merely as such. Heading "D" (p. 22) and the authorities cited under it, as the heading imports, concern statutable assignments.

We admit that a receiver merely by virtue of his appointment has no extra-territorial authority. But it must be remembered here that the receivers took *possession* of the Alaska assets immediately upon their appointment (rec. pp. 67, 93, 152), and *even though no transfer at all had been made to them*, no one unless with a better title could defeat their possession. In *Sands v. Greeley & Co.*, 88 Fed. (C. C. A. 2nd circuit) 130, the court says:

"When property in another state has actually been reduced to his possession, he can stand upon his possessory title, and defend his rights against

all others who cannot prove a better title. It is only when he is compelled to resort to the courts to obtain possession of assets that he must rely upon that principle of comity upon which alone his title rests." (P. 132.)

See also High on Receivers (4th ed.) pp. 68-69.

We admit that an assignment *under a statute* whether made voluntarily or involuntarily can demand recognition only in the state where the statute has force. We do not claim that a statutable assignment even though voluntarily made must be generally recognized. If the transfer is provided for by statute and is made under and in accordance with the statute, it can command only local recognition. Such a case must be distinguished from one in which the statute *does not provide for the assignment*, but only takes effect when an assignment has first been made. See *In Re Farrell, supra*.

Our case, however, is not one in which the receivers are claiming recognition in Alaska by virtue of their appointment, but are claiming both by virtue of their actual possession and as owners of the property under a common law transfer. The undisputed testimony is that the transfer here was not provided for or made under any statute (rec. pp. 73, 99). Counsel's numerous cases, therefore, dealing with the powers of receivers merely by virtue of their appointment and with statutable assignments, whether voluntary or involuntary, have no application here.



Our position here is that the receivership was voluntary and the transfer was therefore voluntary, and that since the transfer was not provided for and not made under any statute, it was a voluntary common law transfer, universally binding, even though made as part of the receivership proceedings; but that as a matter of fact the transfer had only an accidental connection with the receivership proceeding and was itself voluntarily made whether the receivership was voluntary or not. Being voluntary and not statutable it must be recognized in Alaska.

The proposition at the top of page 25 of the answer brief, in the broad form in which it is stated, is not supported by any of the authorities cited for it, and the Ward case, *supra*, is a direct refutation of it. Counsel states in the middle of that page "that a conveyance made pursuant to an order could have no wider extra territorial effect than the order itself." It is well known, however, that when a court directs the execution of a deed in specific performance of a contract, the deed is binding as though made freely without any court order, presumably because the court merely compels the execution of a duty voluntarily assumed, and the deed is voluntary though the court order directs the making of it, since the maker voluntarily assumed the duty of making it.

So the Ward case is authority for the proposition that where the receivership is a voluntary proceeding a transfer in it, although directed by the court, partakes of the nature of the receivership and is likewise voluntary and binding as a free act of ownership. Our case is much stronger than the Ward case, since here not only was the receivership initiated by the company itself, but volition was again exercised independently of the receivership proceeding when the company freely planned and executed the transfer, enlisting the cooperation of the receivers to go into court with its president for an order in the premises.

Now the authorities cited in support of defendant's contention stated at the top of p. 25 of their brief. A quotation is first made from High on Receivers, but the author is clearly referring to compulsory assignments by the corporation to the receivers, in so much as the only authority for the statement is *Catlin v. Company*, upon which also the answer brief expressly relies. In the Catlin case the receivership was involuntary, and the transfer to the receivers compulsory. The owner exercised no volition as to either. The case merely decides that "a court cannot extend its jurisdiction by the appointment of a receiver, so it is equally powerless to do so by coercing an assignment of the property in controversy." We have no quarrel with this

holding. The court there pointed out the law which we maintain controls here, namely:

“The voluntary transfer of a chattel by the debtor, if it is not forbidden in other respects by the law at the place of the situs, is to be as much regarded there or elsewhere as it would be at the place of the domicile.”

The court further distinguished the two in these words:

“Involuntary assignments which are made under foreign insolvent laws have no operation outside of the state under whose laws they are made, while a voluntary assignment is a personal, common-law right, possessed by every owner of property, and may operate in one state as well as another.”

With reference to the section which defendants quote and rely on, Judge High points out “the rule above announced has reference to cases of ordinary receivers appointed under general chancery powers, where the receiver is vested with no sort of legal title, but is regarded as a mere custodian of the fund or property while it remains under the control of the court” (§241-A). He further points out (§244) that where the receiver has title of any sort, a different principle applies from that quoted in defendants’ brief from §240.

The quotation from Cyc. on p. 26 of the brief expressly refers to involuntary assignments, and the two Kentucky cases on which counsel so much rely

do not sustain the proposition for which counsel cites them. The Huntington case (98 Fed. 464) was decided on the following ground:

“There having been in effect no voluntary assignment either made or authorized by the corporation for the benefit of creditors, but only an assignment worked out through the operation of the judicial decree of the court in Connecticut *under the statute of that state*, it is precisely equivalent to a statutory assignment by the company under the insolvency laws of Connecticut regarding corporations.”

The intimation is that had there been a voluntary assignment of the company, not under a statute, it would be recognized.

The Zacher case next cited (a state court case involving the same matter) decided that:

“The proceeding in Connecticut was a *statutory one* for winding up the affairs of an insolvent corporation under the laws of that state, and is operative as to property in Kentucky only so far as the courts in this state choose to respect it” (59 S. W. 495, col. 2).

And the court intimates that had the judgment purported on its face to have been “a consent judgment,” as the order here recited, a different case would have been presented. The undisputed testimony in the case at bar is that the transfer was not made under any statute, and the order relating to it on its face shows it was made with the consent of the company.



The next contention in the answer brief is that comity will not be extended where not reciprocated (p. 26), and counsel cites two Washington cases to show that an assignment of the kind in question, if made in Alaska, would not be recognized in Washington. However, neither Washington case cited involves an assignment like that here in question. The first case, *Happy v. Prickett*, 24 Wash. 290 (64 Pac.), involved an "assignment made in Illinois in accordance with the statutes of Illinois" (p. 292); and in the second case, *Bloomington v. Weil*, 29 Wash. 611 (70 Pac.) "the assignments were made under the provisions of and in compliance with the statutes of the state of New York" (p. 613). The case of *In re John L. Nelson & Bro. Co.*, cited by defendants' brief (p. 28) in this connection, involved "a deed of assignment for the benefit of creditors, pursuant to the statutes of Illinois" (p. 591). We freely agree that in cases of statutable assignments, voluntary or involuntary, no recognition need be extended in foreign jurisdictions whether there is reciprocity or not; and this is really all that the defendants' citations hold.

The next point in defendants' argument is that a voluntary common law assignment only receives recognition in other states as a matter of comity (p. 29). If by this counsel means that a state by legislation may supersede the common law and deny

effect to such assignments, his authorities support him, and we never disagreed. But he must and does claim more. First he is mistaken (p. 29) in considering that our position as to the binding effect of such assignments depends upon "the theory that the situs of the personal property is the domicile of the owner." Our position is that a voluntary common law assignment, no matter where made or where the property is situated, must be recognized everywhere, except where the common law has been superseded by statute or established public policy. In this, defendants' citations sustain us, not them. The doctrine in *Green v. Van Buskirk*, 5 Wall. 307, 18 L. ed. 599, first cited is to the effect that such assignments will be recognized unless "the statutes of the country where property is situated or the established policy of its laws prescribe to its courts a different rule"; and later, "no one can seriously doubt that it is competent for any state to adopt such a rule *in its own legislation*, since it has perfect jurisdiction over all property, personal as well as real, within its territorial limits." See 18 L. ed. 600, col. 2.

The case of *Disconto Gesellschaft v. Umbreit*, cited on p. 31, is not at all in point, instead of being identical as the brief contends. The contest there was between two lien claimants over property admittedly that of a common debtor, and the debtor and one lien claimant were German citizens. Besides the German lien claimant really represented

the bankruptcy court in Germany, and the law there provided:

“Pending the bankruptcy neither assets nor any other property of the bankrupt are subject to attachment or execution in favor of individual creditors” (52 Law ed. 628, col. 1).

It may very well be that international comity applies in such a case, where the contest is between a citizen of Germany and a citizen of one of our states, as to whose lien on a common debtor's property is to be given priority. But here the contest is between citizens of the U. S. and the question is whether a common law title given in one state of the union will be recognized in another.

“The effect of such a [voluntary common law] transfer on goods in another state is not to be determined simply by the rule of comity which is applicable to extra-territorial assignments by operation of law, but rests on the general principles of jurisprudence as to the right of everyone to dispose of what he owns. *Egbert v. Baker*, 50 Conn. 319, 20 Atl. 461; *Bank v. Walker*, 61 Conn. 154, 23 Atl. 696.” *Ward v. Co.*, *supra*.  
In *Security Trust Co. v. Dodd*, 43 L. ed. 835 (173

U. S.), so much relied on by counsel, *Oakey v. Bennett*, 11 How. 33, is quoted as follows:

“A statutable conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principle of comity,” etc.

The implication being that if the transfer were not statutable its recognition would depend upon law and not comity.

Only a few of the cases cited in our brief, pp. 28-37, holding that a voluntary common law assignment in one state will be recognized as binding in other states even as against local creditors, are criticised by defendants (ans. br. p. 32). We shall not therefore give space to showing further that the criticisms made for the most part do not affect the principle involved.

The holding of the lower court on this point, and defendants' case, rests wholly upon the case just mentioned of *Security Trust Co. v. Dodd*, 173 U. S. 625, 43 L. ed. 835 (ans. br. pp. 33-38). Need anything more be said of this case than that it had no concern with *common law assignments*? Assume that the court meant what counsel and the lower court consider it meant, when speaking of common law assignments, yet the statement was mere dictum—a dictum of uncertain meaning, matched against the decisions of all the state courts with the exception of Maine and Illinois; against the decisions of the federal courts and all other decisions of the Supreme Court itself—a dictum which with the meaning ascribed to it is inconsistent with the cases cited by the Supreme Court as supporting it, as well as with its subsequent adjudications.



What the Supreme Court *decided* in the Dodd case was this, in its own words:

“We are therefore of the opinion that the *statute of Minnesota* was in substance and effect an insolvent law; was operative as to property in Massachusetts only so far as the courts of that state chose to respect it, and that so far as the plaintiff, as assignee of the D. D. Merrill Co., took title to such property, he took it subservient to the defendant’s attachment.”

The decision thus concerns merely a statutable assignment, and accords with our contentions.

If the Supreme Court meant by the dictum relied upon that common law and involuntary and statutable assignments are in the same class so far as citizens of another state are concerned, why does it devote several pages to a consideration of the nature of the assignment there, and deem a decision of this question necessary to a determination of the case? Manifestly the court meant no more than what it laid down elsewhere in the opinion (p. 839, col. 2):

“A title to personal property acquired under such laws (insolvency statutes of other states) will not be recognized in another state when it comes in conflict with the rights of creditors pursuing their remedies there against the property of the debtor,”

but that a common law assignment will be recognized unless creditors have prior liens or other legal

rights, or unless it conflicts with local statutes or established public policy. There is no such conflict here.

Neither of the first two authorities referred to by defendants on p. 36 attempts to *construe* the supreme court's meaning in the dictum relied on. They merely set forth what the court said. Nor do the remaining cases support the defendants, unless possibly the first two which are Illinois cases, where our rule is departed from, as said. The case of *Shinler v. Israel* uses the uncertain expression "rights of local creditors" without any suggestion that local creditors have rights except under laws or established public policy. 3 Amer. & Eng. Enc. (2nd ed.) 49 says rightly that a voluntary assignment will not be enforced by a state "if opposed to its laws or public policy." The case of *Faulkner v. Hyman* apparently concerns a statutable assignment; if not it is in conflict with the later Massachusetts cases (see our brief p. 34). The next case cited is concerned with matters of comity which, as said, are not relevant here. And with respect to that case and the dictum in the Dodd case, we say of course every state "will protect the *rights* of its own citizens" whether threatened by citizens of other states or by fellow citizens; but our whole contention is that McDonald has no "*right*" to have a common law transfer ignored since it does not conflict with any statute or established public policy in

Alaska. We ask the court to say with Judge Field (later chief justice of Massachusetts):

“We do not give effect to a foreign law prejudicial to our own citizens. We give effect to an assignment which is good against the plaintiff in this action by our own law.” (*Train v. Kendall*, 137 Mass. 366.)

Defendants' conjecture (br. p. 37) that we consider an attempted rule unconstitutional merely because by its application one creditor would obtain more than another is absurd. Our position is simply that to hold an assignment without force in Alaska when its citizen is suing, and binding if a citizen of another state is suing, is unconstitutional. The case of *Belfast Savings Bank v. Stowe*, 92 Fed. 100. (C. C. A.) parallel in its facts to the one at bar, so decided, and held that *Blake v. McClung*, 176 U. S. 59, is in point and controlling. Counsel does not attempt to distinguish the Belfast Savings Bank case from the one at bar, but claims the case of *Blake v. McClung* was overruled by the *Disconto Gesellschaft* case. The case of *Blake v. McClung* and the Belfast Savings Bank case were involved with the constitutional principle forbidding discriminations between citizens of the several states. How could the authority of these cases be affected by the *Gesellschaft* case, which was solely concerned with a contest between a citizen of Wisconsin and a citizen of Germany? Besides, the German cor-

poration's authority was no greater than that of a mere receiver from a foreign state since it appeared as the representative of the German Bankruptcy Court, and the laws there, as said, expressly provided that in Germany the company had no standing in its own right. Where the only question involved is whether a German citizen will be allowed a prior lien over a citizen of Wisconsin claiming against the same debtor, whose title to property is not in dispute, the case is of course one for the application of international comity; but we repeat that where the question is whether a common law transfer made in one state of the union will be recognized in another having no conflicting statutes, that question is not one of comity at all, but of enforcing the common law of both jurisdictions.

We have already noted that the Washington case cited on p. 43 of the brief concerned a statutable assignment. The next two cases cited are from Illinois, which with one or two other states holds the exceptional doctrine. The case of *Bizzell v. Bedient*, next cited, concerned a statutable assignment under the insolvency laws of New York. The citation from Cye refers simply to the powers of receivers by virtue of their appointment. We admit the rule quoted at the top of p. 44, but we are asking to have defendants' rights declared as a matter of law, not seeking to contravene any rights they have by the application of comity.



## NON-RECORD OF ASSIGNMENT.

The statute, R. S. §4192, 7 Fed. Stats. Ann. 42, provides with reference to vessels for recording "in the office of the collector of customs where such vessel is registered or enrolled." Obviously the statute refers only to registered or enrolled vessels, as was held in *Thurber v. Sloop "Fannie,"* 23 Fed. Cas. No. 14014. See 25 Am. & Eng. Enc. of Law (2d ed.) 877, for cases collected. Defendants in error do not claim the *Bernice* is either registered or enrolled, and the statutes do not contemplate that a vessel under 20 tons shall be enrolled. R. S. §§4311, 4331 and 4371, 7 Fed. Stats. Ann. pp. 56, 63 and 76 respectively. Counsel contends that the *Bernice* must be classed as "enrolled *and* licensed" because there are only two classes of American vessels "those registered and those enrolled *or* licensed." We do not see that a class of vessels "enrolled *and* licensed" is one of the two mentioned. The contention apparently is that although the *Bernice* is not enrolled and licensed (only the latter) yet it must be classed as enrolled and licensed, contrary to the fact, and although this is not one of the two classes of American vessels mentioned by counsel.

Not only has it been held, as shown, that the statute only applies to registered or enrolled vessels, but also that it was designed to protect persons who have actually dealt on the faith of the record

title, and as to whom it would work a fraud to admit unrecorded titles to their detriment. It *does not enable mere attaching creditors to oppose equities which are valid against their debtor.* *Ft. Pitt Nat'l Bank v. Williams*, 42 La. Ann. 418. Defendants in error are mere attaching creditors. They advanced nothing on the faith of the record. Even had they parted with something of value, it is not claimed that they examined the records, or that they knew what the records showed, or at all acted in reliance upon the record title. In fact, the evidence shows that months before the attachment was made McDonald's attorney was informed that the transfer was then about to be made. He certainly was sufficiently informed so that it cannot be said that without further inquiry he acted in good faith in assuming that no assignment of the property had been made by the Pacific Coast & Norway Packing Co. (Rec. pp. 125, 129, 135, 136, 140 and 143.)

Not only did the defendants in error have notice that a transfer was to be made and presumably had been made long before their attachment; but also the receivers as assignees had held possession of and used all the properties for months before the attachment was made. Certainly this was sufficient to put defendants in error upon notice as to the assignees' claim of title.

Except this provision for recording instruments affecting the title to enrolled and registered vessels, there is no requirement for recording in order to protect title. There are provisions for changing the registry, enrollment or license upon sale, but there is no provision that a sale shall be invalid if this is not done. In fact with respect to enrolled and licensed vessels no penalties whatever are prescribed (36 Cyc. pp. 15-16), and these provisions as to change of registry, enrollment or license have no effect upon the validity of transfers of vessels. 36 Cyc 27.

While we are clear that the point is without force for the above reasons, we also urge that defendants are not entitled to raise the point here.

When plaintiffs' witness testified that the "Bernice" was neither registered nor enrolled, weighing only 11 tons (rec. p. 111), defendants' counsel objected to the answer on the ground that it was incompetent, irrelevant and immaterial, and the answer was stricken upon that ground (rec. 73). Certainly, after this defendants are estopped to raise a point in their brief to which this evidence is relevant and material. The court will note too that the lower court merely found that the bill of sale was not recorded. It did not find that there was any provision for record, or conclude that the instrument was invalid because not recorded, and defend-

ants in error asked for no such findings or conclusion. The court in its long opinion makes no mention whatever of this point. Defendants in error are now raising a point, evidence concerning which they considered irrelevant and immaterial at the time of the trial, and concerning which they asked no findings or conclusions, and the court made none.

### CONCLUSION.

The Pacific Coast & Norway Packing Company endeavored by instigating the receivership to have its assets in the state of Washington equally distributed among its creditors, and by means of the transfer to make the same disposition of its Alaska assets. Its desire was that there should be no inequality or injustice among its creditors in sharing its property. The defendant McDonald is the only creditor who has sought to be paid in full regardless of the fate of the other creditors. The evidence is all that the transfer was a voluntary common law assignment, and there is nothing in the law of Alaska which affects the binding force of such a transfer.

We respectfully submit the judgment should be reversed.

WINFIELD R. SMITH, and  
WINN & BURTON,  
Attorneys for Plaintiffs in Error.





IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

E. SCHOENWALD and S. T.  
HILLS, as Receivers and As-  
signees of the Pacific Coast & Nor-  
way Packing Company, a corpora-  
tion,

*Plaintiffs in Error,*

*v.*

HARRY A. BISHOP, as United  
States Marshal for the first divi-  
sion of the district of Alaska, and  
D. N. McDONALD,

*Defendants in Error.*

No. 2817

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UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT OF THE  
DISTRICT OF ALASKA,  
DIVISION NO. 1.

---

**Plaintiff in Error's Petition for Rehearing**

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WINFIELD R. SMITH, and  
WINN & BURTON,

Attorneys for Plaintiffs in Error.

Seattle, Washington.

File  
SEP 4 - 1917  
F. D. Mond...



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We ask the court to reconsider its holding in this case, not because there is question concerning the law which has been applied limiting the jurisdiction of this court. Defendants in error have argued the



case on its merits considering the whole matter open for review. Naturally we did not in our briefs attempt to show a thing not disputed. The lower court and counsel for both sides considered there was no question of fact involved, but merely questions of law (rec. p. 176). We submit this is true and in so far as the findings of fact touch the essential controlling issues involved they are unsupported by evidence.

The proofs establish that the officers and stockholders ratified and acquiesced in the execution of the bill of sale (rec. pp. 68, 69, 70, 84, 94, 95, 96, 152, 153, 154); that the company originated the receivership proceedings and they were conducted in its behalf (rec. 66, 83, 92, 151) and that the order pertaining to the transfer was not a necessary or required part of those proceedings, but was suggested by the company and obtained with its cooperation to accomplish its purpose (rec. 70, 73, 76, 87, 95, 96, 99, 154, 155, 201). In short, the receivership proceedings, the order and the transfer were instituted by the company itself and were its voluntary acts from start to finish. These we insist are the decisive controlling facts. All the evidence pertaining to them will be found on the pages referred to and there is no conflict.

Ultimately there are two questions involved, namely: Was the transfer the company's act, and

if so, was it voluntary? The court found "that said corporation has not by any action of its governing board transferred or assigned said property to said Schoenwald and Hills in any capacity, or at all, nor at all ratified or acquiesced in any such assignment or in said receivership proceedings" (finding VIII). Now it is true the record shows and it is not questioned that the governing board of the corporation did not formally act in making the transfer, instituting the receivership and obtaining the order pertaining to the transfer and that it did not by formal action ratify these things. However, formal action is not essential. That the instrument of transfer in this case was in fact executed by officers of the corporation acting in its behalf and that all the company's officers and stockholders ratified and acquiesced in this is established by undisputed evidence. The court found simply that the corporation did not act by one method, but the testimony shows without conflict that it acted by another.

This finding with reference to ratification and acquiescence is ambiguous. It may mean that the company did not by formal action of its governing board ratify the transfer and the receivership, or it may mean that it never in any way ratified or acquiesced. If the former is meant the finding is immaterial, since as we have shown the corporation acted by another method. If the latter is meant the finding is contrary to the undisputed testimony that all

the officers and stockholders did in fact ratify and acquiesce in the transfer and receivership proceedings.

Now as to the second vital question: Was the transfer voluntary? We have disposed of the court's finding that the receivership and transfer were not ratified and acquiesced in by the company. We repeat there is no evidence to support it. The fact that the proceedings were adversary in form does not itself show they were so in fact, and the unquestioned proof that the proceedings were originated by the company and conducted in its behalf is controlling and decisive.

We ask the court to clearly recall our position that the receivership proceedings were voluntary and hence the transfer even had it been a required part of them would have been voluntary. However assume the receivership was involuntary and that there was some evidence to show this, it does not follow that the transfer was involuntary since it was not a requisite part of the receivership. The situation is parallel (except in one respect hereafter shown) to the question whether the corporation in fact acted or not. We showed that although there was evidence to support the finding that the company did not act by one method yet there was none that it did not act at all. The evidence that it acted by another method was not questioned. Here

there is not even evidence to support the court's conclusion that the receivership was involuntary, but even had there been, the uncontradicted evidence shows the transfer was nevertheless voluntary. It was not provided for by any law or statute and it was not therefore required (rec. pp. 73, 99). In fact the record of the proceedings itself shows this. The testimony that the connection between the receivership and the transfer entirely came about through the voluntary action of the Company stands unquestioned. The record in so far as it pertains to the transfer cannot be said to be adversary even in form, for although the order recites that the receivers applied for it, it also recites that the company consented to the order through its president. The court's seventh finding, referring to the transfer, that "said instrument in fact was executed pursuant to the order of the Superior Court of the State of Washington in and for King County" is established by the evidence but the controlling and decisive fact is that the order was not a required part of the receivership proceedings but only became connected with them by virtue of the company's voluntary action. There is no evidence conflicting with this last statement which decisively shows that the transfer was the voluntary act of the company, whether the receivership was or was not an *in invitum* proceeding.



This court indicates in its opinion that had the plaintiff rested upon the record of the receivership proceedings in the Washington court there would have been evidence to support the findings. We do not know whether or not the court concludes from this that since that record is in evidence the findings have some support. We submit that this conclusion does not follow, since the oral evidence introduced was not simply cumulative or conflicting with that of the record, but was a showing that the record itself and everything pertaining to the receivership and transfer was the product of the company's voluntary acts, which is the decisive and controlling feature of the case. In *Mead v. Chesbrough Bldg. Co.*, 151 Fed. (C. C. A. 2d cir.) 998, there was a request by both parties for a directed verdict and it was held they were concluded by the finding of the court in favor of the defendant unless there was no evidence whatever to support the finding. The plaintiff, however, insisted that certain vital and controlling facts were established and the Circuit Court of Appeals held that if this was true and the facts did not admit of any contrary inference the court below erred and should have directed a verdict for the plaintiff and it considered at length whether the controlling facts were established by evidence substantially undisputed (see opinion beginning bottom page 1002). Our case is analogous in principle. The controlling facts are established by undisputed evidence and entitle us to a reversal.

If the court's eighth finding of fact means only that the corporation did not ratify the transfer and the receivership by formal action of its board of directors then, as we have shown, this finding is immaterial. Both the lower court and counsel for defendants in error considered that a corporation could not act except formally through its board of directors and we are certain the finding was intended to mean that the corporation had not so acted in ratifying these transactions. So construing it, it does not support the conclusion of law that the receivership and the assignment were *in invitum*, since as we have shown the fact that the corporation did not freely act in one way does not justify the conclusion that it did not in another. But we wish to urge further that if the finding means this then the court made no finding whether the corporation had freely instituted the receivership proceedings, made the transfer and ratified and acquiesced in these things other than through its governing board. Plaintiff in error requested findings on these points (see requested findings II, III, VI and VII, pp. 205, etc.). The refusal of the court to make findings on these questions is equivalent to holding them immaterial, of which holding we are entitled to a review.

*Duncan v. The Francis Wright*, 105 U. S. (15 Otto) 381, 26 Law Edition, 1100.

Another case which we ask the court to consider is

*World's Columbian Exposition Co. v. Republic  
of France*, 96 Fed. (C. C. A. 7th Cir.) 687.

There the appellate court recognized the principles which this court has applied in the decision as rendered, but nevertheless reviewed the evidence to determine whether it was sufficient to justify a finding for the plaintiff. The court held that plaintiff in error's requesting a conclusion of law was equivalent to asserting the entire evidence was not sufficient to justify a finding for the plaintiff and the court's refusal to adopt this conclusion was a finding against the defendant on this proposition of law, which ruling could be reviewed. Certainly the conclusions of law we asked (rec. p. 209, etc.) are equally susceptible of such construction and the court should so view them and pass upon the question of law as was done in the case just referred to.

We believe an examination of the references to the record above made will reveal what the lower court and counsel for both parties have considered throughout, namely: that there is no conflict in the evidence with respect to the decisive features of this case, and the consideration of the court's findings we have made in the light of the record shows that the findings, in so far as they pertain to controlling questions in the case are unsupported by the evidence.

There is an independent matter which properly does not belong here but we beg the court's consideration. Should the court review the question whether the oral testimony admitted contradicts explains or controls the evidence furnished by the record of the proceedings in the state court, we ask it to keep clearly in view our contention that this question with reference to the receivership proceedings as a whole is entirely independent of the question with respect to the order providing for the transfer. Even should the court find that oral evidence offered for the purpose of showing the receivership proceedings were voluntary is objectionable and therefore hold the receivership proceedings to have been involuntary, nevertheless this is not decisive of the plaintiff in error's right to recover. The order and transfer must be viewed as entirely independent and separate from the receivership proceedings. The question whether the oral evidence contradicts, explains or controls in any objectionable sense must be asked specifically with reference to the order directing the transfer viewed independently of the rest of the proceedings. Our contention is in this respect that the recitals of the order harmonize with and confirm the testimony that it and the transfer pursuant to it were the result of the free action of the company.



We respectfully submit that the court's findings on essential facts are unsupported by the evidence and that the judgment should be reversed.

WINFIELD R. SMITH, and  
WINN & BURTON,  
Attorneys for Plaintiffs in Error.

### CERTIFICATE.

I, Winfield R. Smith, one of the attorneys for the plaintiffs in error above named, hereby certify that the petition for rehearing herein is in my judgment well founded and it is not interposed for delay.

WINFIELD R. SMITH.



















